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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

314
Adv. pt. 1
6-1-43
(part 2)
56
280

FEBRUARY TERM, A. D. 1943

ALBERT F. JOHNSON,

Appellant

vs.

CHARLES M. THOMPSON, as Trustee
of Chicago and North Western Rail-
way Company, a corporation, and
Oscar B. Anderson,

Appellees.

APPEAL FROM
CIRCUIT COURT OF
WINNEBAGO COUNTY.

319 I.A. 113'

DOVE, J.:

In an action by appellant against ~~appellees~~ appellees in the circuit court of Winnebago County for personal injury and property damages, resulting from a railroad crossing accident, the court, at the close of all the testimony, directed a verdict for appellees and the plaintiff has appealed from a judgment rendered on that verdict.

The record discloses that the accident occurred in the City of Rockford at about one o'clock P. M. on Sunday, March 9, 1941, where the tracks of the Chicago and Northwestern Railway Company which runs in a northwesterly and southeasterly direction cross Sixth Street, which runs in a northerly and southerly direction. Seventh Street is the next street east of Sixth Street and is parallel therewith. Sixth Avenue is an east and west street and intersects the two streets named. The railroad

IN SENATE

CONFIRMED

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ALBERT F. JOHNSON

Appellant

vs.

CHARLES W. THOMPSON, as Trustee
of Chicago and North Western Railway
Company, a corporation, and
George W. Anderson,
Defendants.

IN SENATE
CONFIRMED

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In an action by the Chicago and North Western Railway Company, as Trustee of Chicago and North Western Railway Company, for recovery of money, the court of appeals, resulting from a judgment of the court of appeals, the court of appeals of all the testimony, directed a verdict for the plaintiff and the defendant has been affirmed. The record discloses that the plaintiff, in the City of Rockford at about one o'clock A. M. on Sunday, March 8, 1931, when the streets of the City of Rockford and Northwestern Railway Company, which runs northwesterly and southeasterly direction across Sixth Street, which runs in a northerly and southerly direction. Seventh Street is the next street east of Sixth Street and is parallel thereto. Sixth Avenue is an east and west street and intersects the two streets named. The railroad

crosses Seventh Street south of Sixth Avenue. It also crosses Sixth Avenue about midway between Seventh and Sixth Streets, and crosses Sixth Street north of Sixth Avenue.

A spur track leaving the main track west of Sixth Street crosses that street about thirty seven feet north of the main track. Fifteen feet north of the spur track on the east side of Sixth Street is a large brick building, with its west wall adjacent to the sidewalk line, and extending back east for a considerable distance, with a loading platform along the south side ten feet wide, and about five feet north of the spur track.

At the time of the accident, a freight train consisting of a locomotive and tender, seventeen loaded cars, two empties and a way car, was proceeding northwesterly on the main track at a speed estimated at eight miles an hour by appellant's witness, Oscar Freeman, about fifteen miles an hour by plaintiff himself, and five to seven miles an hour by the witnesses for appellees. Appellee Oscar B. Anderson was the engineer.

Appellant, a machinist for twenty years, had been to an orchestra rehearsal east of Seventh Street. He testified he had two small drinks in an ounce glass, and with his son as a passenger, drove his car west on Fifth Avenue and turned left into Sixth Street; that he was familiar with the Sixth Street crossing and had crossed it half a dozen times; ^{that he approached the trucks of the defendants from the north:} that when he was ten feet north of the spur track he glanced to the left and then to the right and did not see anything; that he did not look to the left again until he was about four feet from the main track and the train was practically on him when he first saw it; that he was driving about fifteen miles an hour and did not increase or decrease his speed from the time he first saw the train until the collision occurred. Oscar Freeman, who was sitting in an automobile on Sixth Avenue facing west at a point east of where the railroad crosses Sixth Avenue, saw appellant's car traveling fifty to seventy five feet north of the Sixth Street crossing before the accident and estimated its speed at twenty five miles an hour.

processes seventh street south of Jackson Avenue. The street
Sixth Avenue street north of Jackson Avenue. The street
processes Sixth Avenue street north of Jackson Avenue.

A group of men standing on the sidewalk at the corner of
that street about thirty feet north of the intersection of
fifth north of the street at the east side of which street is a
large brick building, and the street is about fifteen feet
and extending north to the corner of the street, and the street
platform along the street and the street and the street north
of the street track.

At the time of the accident, the street was in possession of a large
positive and tender, a passenger car, and the street was
was proceeding northward on the street track at a speed of about
eight miles an hour. The car was about fifteen feet north of
the street track at the corner of the street, and the street
the witnesses for the accident. The witnesses for the accident
apparently, a mechanical car, and the street was in possession
passenger car at the corner of the street, and the street was
in a house, and the street was in possession of the street.

on Fifth Avenue and turned left into the street, and the street
with the street at the corner of the street, and the street
when he was ten feet north of the street at the corner of the street
then to the right and did not see the car until it was about
left until he was about ten feet north of the street, and the
train was proceeding on the street track at a speed of about
about fifteen miles an hour, and the street was in possession
the time he first saw the car, and the street was in possession
Frederick, who was sitting in a room at the corner of the street
a point east of where the street car was, and the street was
on the street at the corner of the street, and the street was
ing before the accident and seeing the car at the corner of the street
house.

The train whistled for the Seventh Street crossing, and the whistle was heard by all the witnesses for plaintiff, except himself. There were two or three short additional blasts as the train approached the Sixth Street crossing. Freeman testified he heard the whistle the second time when the train was about six feet from appellant's car. His wife and Hjalmer Johnson testified they heard two short blasts but were unable to say how far the train was from the crossing at that time. Esther Carlson, an occupant of the Freeman car, testified she heard the whistle for the Seventh Street crossing, and that it did not blow for Sixth Street. Two of appellees' witnesses estimated the distance east of Sixth Street at which the short blasts were blown as from fifty or sixty to seventy five feet. The engineer of the train testified he saw appellant's car from the time it was one hundred to one hundred twenty feet from the crossing, traveling about fifteen miles an hour; that the engine of the train was from fifty to sixty feet from the crossing; that appellant did nothing and that, as the witness saw, did not turn his head; and that the witness blew two or three short blasts of the whistle and set the emergency brakes. The train came to a stop with the locomotive at a point west of the crossing, estimated by appellant's witnesses at fifty to one hundred feet, and by appellees' witnesses at sixty-five to ninety feet. Exclusive of the engine and tender, the train weighed about one thousand tons.

It was a nice day, the weather clear, the pavement dry, and the streets were free of traffic. Appellant testified that there was nothing the matter with his eye sight; that with glasses his vision was good, and that he had his glasses on at the time of the accident; that when he first looked to the left he could see about seventy five feet; that something obstructed his view and concluded, "it must have been that box car." A witness for appellant testified that about half an hour after

The two witnesses...
whistle was heard...
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of the...
appears...
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whistle and...
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he first...
something...
car. A witness...

the accident he saw a box car on the spur track next to the sidewalk line on the east side of Sixth Street. Nobody testified it was there at the time of the accident. The testimony of a civil engineer shows, that by actual measurements, assuming the box car was there, a person approaching the crossing from the north, at a point sixty feet north of the tracks, had a vision of one hundred six feet east along the tracks, that at fifty feet the vision is one hundred fifty feet, and at forty feet it is two hundred twenty nine feet to the east. Freeman, whose car was parked on Sixth Avenue north of the main track about half a block east of Sixth Street could see and watched appellant's car from the time it was from fifty to seventy five feet north of the railroad crossing. If Freeman saw appellant, it is obvious that appellant could have seen that far east along the track.

The pleadings show there were gates at the crossing, but that they were never used on Sunday, and that there were signs stating "Gates not working." The engineer testified the automatic bell on the locomotive was ringing continuously. Nobody testified that it was not ringing. Although Mrs. Freeman testified she heard no noise from the train as it proceeded west, and her husband testified he did not remember whether he heard the bell, this was merely negative testimony which did not tend to raise an issue as to whether the bell was ringing. (Morgan v. New York Central Railroad Co., 327 Ill. 339, 342-3.)

Briefly summarized, the testimony, in its aspect most favorable to appellant, shows that he was struck at a crossing with which he was familiar, by a train with the bell ringing and the whistle blowing, traveling at not to exceed fifteen miles an hour, on a clear day in the early afternoon, and that appellant's car approached and crossed the railroad tracks at a speed of at least fifteen miles an hour without slackening speed, and by his own testimony he did not look to the left from a point

ten feet north of the spur track until he was about four feet from the main track, a distance of at least forty or more feet. It is manifest from the testimony of his own witness, Freeman, that when appellant was fifty to seventy five feet from the crossing he could have seen the train if he had looked, even if there was a box car at the point claimed by him. The law will not tolerate the absurdity of permitting one to testify that he looked but did not see the danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it. (Dee v. City of Peru, 343 Ill. 36, 42, and cases cited; Greenwald v. Baltimore and Ohio Railroad Co., 332 id. 627, 632; Grubb v. Illinois Terminal Co., 366 id. 330, 337.)

A railroad crossing is a dangerous place, and one who approaches it must use the care and caution commensurate with the known danger. Failure to use ordinary precaution in such cases is condemned as negligence. (Grubb v. Illinois Terminal Co., supra; Greenwald v. Baltimore and Ohio Railroad Co., supra.)

In cases of this character the burden of proof is on the plaintiff, not only to show the injury was produced by the negligence of the defendant, but also that the plaintiff was in the exercise of due care and caution for his own safety. (Casey v. Chicago Railways Co., 269 Ill. 386.) The testimony on appellant's behalf, taken most favorably for him, with all the inferences that can reasonably be drawn therefrom, demonstrates that he was not in the exercise of due care and caution for his own safety at and just before the time of the accident. Under such circumstances the court correctly directed a verdict for appellees. (Illinois Central Railroad Co. v. Oswald, 338 Ill. 270; Greenwald v. Baltimore and Ohio Railroad Co., supra; Provenzano v. Illinois Central Railroad Co., 357 id. 192.) The judgment is therefore affirmed.

Judgment affirmed.

ten feet north of the spur track until he was about four feet from the main track, a distance of at least twenty or more feet. It is manifest from the testimony of his own witness, however, that when appellant was fifty to seventy-five feet from the track he could have seen the train if he had looked, even if there was a fog or mist at the point claimed by him. The fact that he did not observe the approaching train is not a basis for finding that he was negligent in permitting one to testify that he did not see the danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it. (See v. City of New York, 348 Ill. 36, 42, and cases cited; Greenwald v. Baltimore and Ohio Railroad Co., 333 Ill. 627, 632; Green v. Illinois Terminal Co., 333 Ill. 350, 357.)

A railroad crossing is a dangerous place, and one who crosses it must use the care and caution common to such places. Failure to use ordinary precaution in such cases is considered as negligence. (Green v. Illinois Terminal Co., supra; Greenwald v. Baltimore and Ohio Railroad Co., supra.)

In cases of this character the burden of proof is on the plaintiff, not only to show the injury was proximately caused by the negligence of the defendant, but also that the plaintiff was in the exercise of due care and caution for his own safety. (Green v. City of New York, 348 Ill. 36, 42.) The testimony on appellant's behalf, taken from the record, shows, with all the inferences that can reasonably be drawn therefrom, demonstrated that he was not in the exercise of due care and caution for his own safety at and just before the time of the accident. Under such circumstances the court correctly directed a verdict for the defendant. (Illinois Central Railroad Co. v. Green, 333 Ill. 350; Greenwald v. Baltimore and Ohio Railroad Co., supra; Greenwald v. Illinois Central Railroad Co., 337 Ill. 192.) The fact that the defendant testified

42321

ACE ENGINEERING COMPANY, a corporation,

APPEAL FROM

Appellee,

v.

MUNICIPAL COURT

PIONEER BREWING COMPANY, a corporation,

OF CHICAGO.

Appellant.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a statement of claim filed in the Municipal Court of Chicago, Ace Engineering Company, a corporation, sought judgment for \$825.80 against the Pioneer Brewing Company, a corporation, alleging that in accordance with the terms of a written contract plaintiff completed the installation of an oil burner. The answer admitted the signing of the contract, but asserted that plaintiff warranted the burner to operate satisfactorily and that it did not operate satisfactorily and had to be removed. In a counterclaim defendant asked judgment against plaintiff for \$60 which it had paid on account. Plaintiff answered the counterclaim, stating the burner operated in accordance with the agreement. A trial before the court without a jury resulted in a finding and judgment for the plaintiff in the sum of \$825.80, to reverse which this appeal is prosecuted.

In the contract plaintiff agreed to furnish and install in defendant's 75 HP Leffel Scotch Marine Boiler, one Ace Uniflow Rotary Oil Burner, with refinements as set forth therein, to have a capacity of 150 HP. This equipment was guaranteed against mechanical defects for a period of one year. The installation, made at defendant's Joliet plant, was completed and the burner was operated on August 2nd and 5th. The boiler room of defendant's plant was equipped with two boilers, one a 150 HP boiler able to "carry the load all the time", and the other a 75 HP Scotch Marine relief boiler in which the oil burner of plaintiff was installed.

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[illegible]

in defendant's 75 HP roller cotton gin, one of the rollers was equipped with two bolls, one a 150 lb roller to "carry the load all the time", and the other a 75 HP roller which roller in which the oil pump of plaintiff was installed. The roller was operated on about 2nd and 3rd. The roller was at defendant's made at defendant's roller plant, was equipped and the roller was mechanical defects for a series of the year. The roller plant a capacity of 150 HP. This equipment was purchased and installed in the contract plaintiff agreed to install and use the 75 HP roller cotton gin, one of the rollers, one of the rollers, to have

The boiler room was not separated from the rest of the structure. Defendant's theory is that the evidence shows a substantial failure to comply with the essential requirements of the contract. Plaintiff's theory is that the oil burner furnished and installed in defendant's 75 HP Scotch Marine Boiler had a capacity of more than 150 HP, and was in all respects in accordance with the contract, and that the oil burner did operate satisfactorily. The contract required plaintiff to install one Ace Uniflow Rotary Oil Burner to have a capacity of 150 HP, with refinements as specified. If the burner had the capacity and refinements designated and operated on Bunker C fuel oil, the defendant was obliged to pay for it. There was competent evidence that the burner complied in all respects with the terms of the contract. One reason why the defendant removed the burner was that it maintained that smoke from the burner had a deleterious effect on the beer which was in the process of being brewed. The contract itself does not contain any provision covering the smoke situation. There was testimony on behalf of plaintiff that its engineer had no way of telling the effect of smoke on the brewing of beer, but that plaintiff eliminated the smoke. Plaintiff did not guarantee either expressly or by implication that smoke from Bunker C fuel oil would not be injurious to defendant's beer. It does not appear from the contract or the testimony that the defendant relied on the skill and judgment of the plaintiff. The burden of proof was on the defendant to establish a breach of warranty by a preponderance of the evidence. Plaintiff agreed to install an oil burner with a capacity of 150 HP. The oil burner installed had a capacity of more than 150 HP. Plaintiff did not warrant the Scotch Marine Boiler with the 75 HP rating to do the work of a 150 HP boiler. There is evidence, however, that the 75 HP boiler was developed to more than 150 HP.

Plaintiff guaranteed that the equipment would work satisfactorily when burning Bunker C fuel oil. Where a contract is required to be done to the satisfaction of one of the parties, the meaning necessarily is, that it must be done in a manner satisfactory to the mind of a reasonable man. (Keeler v. Clifford, 165 Ill. 544, 549). There is competent evidence that the burner did develop more than 150 HP and that it did operate satisfactorily on Bunker C fuel oil. This case presented a question of fact for the trial judge. He saw and observed the witnesses and their manner upon the stand and had advantages not possessed by us to determine where the truth lay. From the record before us we are unable to say that the court erred in entering judgment. Therefore, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

[illegible]

HEBEL AND KILBY, AUGUST 17, 1964

42461

LOCAL LOAN CO., a corporation,

Appellee,

v.

JACK NORMAN, JESSE BENTON and
WILL SMITH,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

319 I.A. 114¹

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On June 27, 1940 Jesse Benton, Jack Norman and Will Smith borrowed from the Local Loan Company and as evidence of the debt signed a promissory judgment note, agreeing to pay the sum of \$100. On August 28, 1940 Jack Norman filed a voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, Eastern Division. He scheduled the Local Loan Company as a creditor. On January 17, 1941 he was duly discharged. On September 25, 1940 Jesse Benton filed a voluntary petition in bankruptcy in the same district court. He likewise scheduled the debt of the Local Loan Company and was duly discharged on March 24, 1941. On October 7, 1940 Will Smith filed a voluntary petition in bankruptcy in this district court. He also scheduled the debt of the Local Loan Company and was duly discharged on March 18, 1941. On April 1, 1941 a judgment by confession based on the note was entered in the Municipal Court of Chicago in favor of the Local Loan Company and against Jack Norman, Jesse Benton and Will Smith for \$96.42. On April 11, 1941 the defendants filed their motion, supported by affidavits, asking that the judgment be vacated. The court opened up the judgment, granting leave to the defendants to appear and defend and to have their day in court, the judgment to stand as security and the affidavits to stand as affidavits

LOCAL LOAN NO. 1, 1940

1940

v.

JACK MORRIS, GEORGE MORRIS, WILLIAM MORRIS

Defendants

On June 27, 1940, the court, by its order, directed

Smith to borrow from the local loan company the sum of \$100.00

the debt signed a promissory note and, upon its face,

the sum of \$100. On August 28, 1940, the court directed

petition in bankruptcy in the district court of the United

States for the Northern District of Illinois, Eastern Division.

He scheduled the local loan company as a creditor. In January

19, 1941, he was duly discharged. On February 1, 1941, the

Denton filed a voluntary petition in bankruptcy in the

district court. He likewise scheduled the local loan

company and was duly discharged on March 1, 1941.

October 7, 1940, the court directed a voluntary petition in bankruptcy

in this district court. He also scheduled the local loan

company and was duly discharged on March 1, 1941.

A bill, filed by the court, was entered in the

United States Court of Chicago in favor of the local

loan company and against Jack Morris, George Morris and William

for \$22.42. On April 17, 1941, the court directed the

supported by affidavits, and the judgment was entered.

The court opened up the judgment, directing leave to the

to appear and defend and to have their day in court, the judgment

to stand as security and the affidavits to stand as evidence.

of defense. On May 2, 1942 plaintiff filed an amended replication as to each defendant, alleging that the debt was created by defendants fraudulently obtaining money by false representations. In these replications plaintiff alleged that by reason of the false representations it was damaged in the sum of \$96.42. On June 10, 1942 the following order was entered:

"This matter coming on to be heard on the stipulation of the parties and their attorneys, and the court having read the stipulation and being fully informed in the premises hereby orders: 1. The defendants are given leave to withdraw their demand for jury trial. 2. All orders and proceedings entered or had herein subsequent to the entry of the original judgment and issuance of original execution are vacated and set aside. 3. That each party to this record have leave to withdraw physically from this record all papers, documents and pleadings filed by it or them subsequent to the entry of the original judgment and the issuance of the original execution. 4. The original judgment by confession on a promissory note is hereby confirmed. 5. This order is entered without prejudice to any of the parties as to subsequent action in this case."

On June 18, 1942 summons in garnishment was issued. On June 22, 1942 the defendants filed a petition setting up the facts as to their petitions in bankruptcy, the scheduling of the indebtedness on which plaintiff's judgment was based, and their discharges. They asked the court to enter an order permanently staying the issuance of execution on the judgment. On July 10, 1942 the court denied defendants' motion for a perpetual stay of execution and this appeal followed.

At the time the judgment was entered all three defendants had been discharged in bankruptcy. However, as the judgment was entered by virtue of a warrant of attorney, defendants did not have an opportunity at or before the time such judgment was entered to plead their discharges in bankruptcy. Defendants filed their motion to vacate the judgment in seasonable time. It will be observed that the order of June 10, 1942 granted each party leave to withdraw all papers, documents and pleadings filed subsequent to the entry of the original judgment. The record before us does not contain a copy of the affidavits (permitted to stand as pleadings), filed

of defense. On July 1, 1948, the court ordered the
as to each defendant. In the case of the
defendants previously mentioned, the court ordered the
In these proceedings, the court ordered the
representations it was made to the court of the
In the following order, the court ordered:

"This matter coming on for trial, the court ordered
the parties and their attorneys, the court ordered the
attestation and return of the original documents to the
1. The defendants to file with the court, within ten
days of the entry of the order, all papers, documents,
subsequent to the entry of the order, and to the original
original execution and return of the original documents
to this record have been filed with the court, and
all papers, documents, and returns of the original
to the entry of the order, and to the original
original execution, and to the original documents
promissory note is hereby confirmed, and the court
without prejudice to any of the parties in this case."

On June 18, 1948, summons in a proceeding was issued
1948 the defendants filed a petition asking the court to
their petitions in bankruptcy, the petition in the
on which plaintiff's judgment was based, and the court
asked the court to enter an order compelling the defendants
of execution on the judgment. On July 15, 1948, the court
defendants' motion for a writ of execution on the judgment

followed.
At the time the judgment was entered, the defendants
had been discharged in bankruptcy. However, the judgment
entered by virtue of a writ of execution, the court
an opportunity at or before the time when the judgment
pled their discharge in bankruptcy. When the judgment was
to vacate the judgment in reasonable time. It was
the order of June 10, 1948, granted each party the right
papers, documents and findings filed and brought to the court
the original judgment. The record before us does not contain a
copy of the affidavit (submitted to the court) filed

by defendants. Presumably, these affidavits were physically withdrawn from the files pursuant to the order of June 10, 1942. The record, however, does contain the amended replications filed by plaintiff on May 2, 1942. These replications are in reply to the affidavits filed by the defendants. The allegations of the replications are the basis for plaintiff's contention that where a defendant has been discharged in bankruptcy the creditor may sue in contract, and that in case the discharge be pleaded the creditor may reply by showing that the debt arose as a result of obtaining money by false pretenses. Although defendants' affidavits are not in the record, it is reasonable to infer that therein they set forth the facts as to their discharges in support of their motion to vacate the judgment.

Plaintiff's theory of the case is stated to be:

"The discharges in bankruptcy were obtained prior to the original judgment herein, and by confirming the judgment after being in the case over a year, defendants waived the defenses of discharge in bankruptcy if they had same. The defense of discharge in bankruptcy is personal to the defendant and may be waived. There was ample opportunity during that time to plead any defenses they had. The course of action or inaction pursued by defendants and their attorneys for over a year, followed by a stipulation to confirm the judgment, must constitute a waiver of the defense and also an estoppel to raise same. In attempting to erase all orders and by withdrawing all papers filed by them (plaintiff did not withdraw the papers filed by it), defendants seek to present a defense in such manner as to foreclose plaintiff from an opportunity to reply. However, they cannot obliterate the fact that the judgment was opened up, that a jury was demanded, and that the case was pending between the parties for over a year, involving the time and energy of the court and litigants alike. The record shows that ample opportunity was given the defendants to plead any and all defenses. The Municipal Court was justified in its action in refusing to enter a perpetual stay of execution under the circumstances here and was required to so hold. The court correctly held in effect that the judgment entered April 1, 1941, and confirmed by stipulation of the parties and order of court after all of the parties had been 'in court' on it for over a year was a good, valid and subsisting judgment."

Defendants' theory of the case is stated to be:

"The statement of claim upon which the judgment by confession was entered, is a statement on a simple contract claim to wit: a promissory note signed by the defendants June 27, 1940. It is a simple contract indebtedness, provable in bankruptcy. The verified petition set up the discharge in bankruptcy of defendant,

Jack Norman on the 17th day of January, 1941, the discharge of Jesse Benton on March 24, 1941, and the discharge of Will Smith on March 18, 1941. Further, each debtor scheduled the claim of the plaintiff in his bankruptcy proceedings. The judgment by confession was entered on April 1, 1941, and since it was by confession, the court will take judicial notice of the fact that the defendants had no opportunity to plead their discharge before the judgment was entered. The discharge in bankruptcy was a bar to all debts scheduled in bankruptcy proceedings and existing on the date of the bankruptcy."

It is manifest that defendants could not plead their discharges in bankruptcy at the time the judgment was entered. They did plead their discharges within a reasonable time. After the amended replications were filed by the plaintiffs, the case remained dormant for 13 months. The parties then filed a stipulation. On June 10, 1942, pursuant to the stipulation, the court entered the order which, among other things, confirmed the judgment. A few days thereafter a garnishment summons was issued. Apparently, this resulted in the filing of a petition for a perpetual stay of execution, which the court denied. The facts are not in dispute. Plaintiff concedes that the points advanced by defendants may properly be presented by a petition in the manner followed by defendants.

In the view we take of the case, it is only necessary to consider one point, namely, the contention of plaintiff that by confirming the judgment after the defendants were in the case more than a year, they waived the defenses of discharge in bankruptcy. A discharge in bankruptcy is analogous to the Statute of Limitations in that it does not annul the original debt, but merely suspends the right of action for its recovery. Bush v. Stanley 122 Ill. 406, 416. The bankrupt, if he wishes to avail himself of the benefit of his discharge in bankruptcy in any particular suit, must plead it properly and seasonably. A plea of discharge in bankruptcy is

Jack Norman on the 17th day of January, 1941, the discharge of
Lease Benton on March 18, 1941, and the discharge of all other
on March 18, 1941. Further, each debtor scheduled the amount
of the plaintiff in his bankruptcy proceedings. The judgment
by confession was entered on April 1, 1941, and since it was by
confession, the court will take judicial notice of the fact
that the defendants had no opportunity to lead their discharge
before the judgment was entered. The discharge in bankruptcy
was a bar to all debts scheduled in bankruptcy proceedings and
existing on the date of the bankruptcy."

It is manifest that defendants could not affect their

discharges in bankruptcy at the time the judgment was entered.

They did affect their discharges within a reasonable time after

the amended replications were filed by the plaintiff, the case

remained dormant for 16 months. The parties then filed a stipu-

lation. On June 10, 1942, pursuant to the stipulation, the court

entered the order which, among other things, confirmed the judgment.

A few days thereafter a writ of attachment was issued. Apparently,

this resulted in the filing of a petition for a permanent stay of

execution, which the court denied. The facts are not in dispute.

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416. The bankrupt, if he wishes to avail himself of the benefit

of his discharge in bankruptcy in any particular suit, must affect

it properly and seasonably. A plea of discharge in bankruptcy is

personal to the debtor and he may waive the benefit of his discharge by failing to plead it. At the time the order of June 10, 1942 was entered, the case had been at issue for 13 months. The issue raised was whether the defendants were entitled to prevail in their contention that their discharges in bankruptcy should result in a finding in their favor. Had this issue been determined by the court as a contested matter, the order entered would have been to confirm the judgment or to vacate the judgment, finding the issues for defendants, and entering judgment against plaintiff. At that time the parties and the court knew all of the facts and were properly acquainted with the issues confronting them. In this state of the record they induced the court to enter an order confirming the original judgment. The order recites that it was entered "without prejudice to any of the parties as to subsequent action in this case". Defendants insist that under the latter clause they had a right to file, and should prevail in their petition for a perpetual stay of execution. The order of June 10, 1942 by its language confirmed the original judgment. The paragraph that the order was entered without prejudice as to subsequent action in the case clearly was not intended to leave the door open for any of the parties to attack the action of the court in confirming the judgment. In confirming the judgment the court entered the same order as it would have entered had it decided the case in favor of the plaintiff following a trial. This is not a case where the defendants were discharged in bankruptcy subsequent to the entry of the judgment. In this case defendants were discharged before the judgment was entered. Hence, they had a right to present their defense that they were discharged in bankruptcy as a basis for vacating the judgment and for a finding in their favor. This was done, and that is the issue which was determined by the court

personal to the doctor and a copy of the report of his diagnosis by failing to place it, at the time the order was made, in the case entered, the case had been entered as for a verdict. The issue raised was whether the defendants were entitled to a verdict in their contention that their discharge in bankruptcy would result in a finding in their favor. Had this issue been determined by the court as a contested matter, the order entered would have been to confirm the judgment or to vacate the judgment, finding the issue for defendants, and entering judgment in their favor. At that time the parties and the court knew all of the facts and were properly acquainted with the issues involved. In this state of the record they induced the court to set an order confirming the original judgment. The order vacated the judgment entered "without prejudice to any of the parties as to subsequent action in this case". Defendants insist that under the latter clause they had a right to file, and should prevail in their action for a perpetual stay of execution. The order of June 10, 1922, by its language confirmed the original judgment. The order which that the order was entered without prejudice as to subsequent action in the case clearly was not intended to leave the door open for any of the parties to attack the action of the court in confirming the judgment. In confirming the judgment the court entered the same order as it would have entered had it decided the case in favor of the plaintiff following a trial. This is not a case where the defendants were discharged in bankruptcy subsequent to the entry of the judgment. In this case defendants were discharged before the judgment was entered. Hence, they had a right to demand their defense that they were discharged in bankruptcy as a basis for vacating the judgment and for a finding in their favor. This was done, and that is the issue which was determined by the court.

when the judgment was confirmed. If the court did not intend to pass on the issue of bankruptcy, it would have been unnecessary to confirm the judgment. A judgment need only be confirmed when it is questioned. In confirming the judgment the court was settling the question raised by defendants. We must assume that the parties were acting in good faith and that in inducing the court to enter the order pursuant to the stipulation, they were disposing of the case. At the time the order of June 10, 1942 was entered, defendants knew that they had a right to insist on their position that the discharges in bankruptcy barred the action. They also knew that plaintiff, in opposing their contention, was maintaining that defendants had obtained the consideration for the note by means of false representations, and that the judgment should stand unimpaired despite the discharges. With full knowledge of their rights they agreed that the judgment should be confirmed. All of the facts set out in the petition filed by defendants on June 22, 1942 were in existence and known to them on June 10, 1942. The defendants had ample opportunity to plead and apparently did plead their discharges in bankruptcy during the period of 13 months in which the case was pending. We agree with plaintiff that when they elected to withdraw their pleadings and caused the judgment to be confirmed, they waived any right they may have had to assert their discharges in bankruptcy and for a perpetual stay of execution. The relief latterly sought by defendants (for a perpetual stay of execution) was in form different from the relief first sought (vacating the judgment and finding the issues in their favor), but the result, were they to prevail on either theory, would be to deprive the plaintiff of any remedy in recovering its loss.

For the reasons stated, the order of the Municipal Court of Chicago is affirmed.

ORDER AFFIRMED.

HEBEL AND KILEY, JJ. CONCUR.

when the judgment was confirmed. It was found that the court had not issued an order on the issue of execution, it would have been unnecessary to confirm the judgment. The judgment was confirmed by the court. In confirming the judgment the court was stating the question raised by defendant. The court stated that the parties were acting in good faith and that in bringing the court to order the order pursuant to the stipulation, they were discharging of the case. At the time the order of June 10, 1942 was entered, defendants knew that they had a right to insist on their position that the discharge in bankruptcy barred the action. They also knew that plaintiff, in opposing their contention, was maintaining that defendants had obtained the consideration for the note of means of false representations, and that the judgment should be affirmed. With full knowledge of their rights they agreed that the judgment should be confirmed. All of the facts set out in the petition filed by defendant on June 10, 1942 were in existence and known to them on June 10, 1942. The defendants had ample opportunity to object and successfully did object and the charges in bankruptcy during the period of 12 months in which the case was pending. We agree with plaintiff that when they elected to withdraw their pleadings and caused the judgment to be confirmed, they waived any right they may have had to assert their discharge in bankruptcy and for a perpetual stay of execution. The relief lawfully sought by defendants (for a perpetual stay of execution) was in form different from the relief sought (vacating the judgment and finding the issues in their favor), but the result, were they to prevail on either theory, would be to deprive the plaintiff of any remedy in recovering its loss.

For the reasons stated, the order of the bankruptcy court of Chicago is affirmed.

ORDER AFFIRMED.

HERBELL AND KIRBY, JJ. CONCUR.

42480

THE PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,)

v.)

RUTH SLADE,)

Plaintiff in Error.)

ERROR TO

MUNICIPAL COURT

319 I.A. 114²
OF CHICAGO.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

An information filed in the Municipal Court of Chicago on August 6, 1942 charged that on August 4, 1942 Ruth Slade at Chicago, Cook County, Illinois "unlawfully, intentionally and maliciously did then and there give a false address to Dr. F. H. Westerschulte, 2727 Hampden Court, Chicago, Illinois, to procure a written order for twenty (20) half grain tablets of morphine sulphate, a derivative of opium, in violation of Paragraph 192.20 (d), Chapter 38, Ill. Rev. Stat. 1937, contrary to the form of the statute in such case made and provided and against the peace and dignity of the People of the State of Illinois". On August 11, 1942 the defendant was arraigned and pleaded not guilty. The record shows that defendant was present in her own proper person; that she was represented by counsel; and that she waived trial by jury. After hearing the testimony of the witnesses and the arguments of counsel, the court found the defendant guilty in manner and form as charged in the information, entered judgment on the finding and sentenced her to confinement in the County Jail for a term of four months. She prosecutes this writ of error to reverse the judgment.

Section 192.20 (1) of Chapter 38, Ill. Rev. Stat. 1937, reads: "No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug * * * by the use of a false name or the giving of a false address". Defendant urges that the allegation that defendant

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

RUTH SLANE,

Plaintiff in Error.

MR. PRESIDING JUSTICE KEENE DELIVERED THE OPINION OF THE COURT.

An information filed in the Criminal Court of Chicago

on August 6, 1942 charged that on August 1, 1942 Ruth Slane at

Chicago, Cook County, Illinois "unlawfully, intentionally and maliciously did then and there give a false affidavit to the Westernerschulte, 2787 Hamman Court, Chicago, Illinois, to secure a written order for twenty (20) half grain tablets of morphine

sulphate, a derivative of opium, in violation of the words 126.10 (d), Chapter 38, Ill. Rev. Stat. 1937, contrary to the form of

the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois". On August 11,

1942 the defendant was arraigned and pleaded not guilty. The

record shows that defendant was present in her own defense person;

that she was represented by counsel; and that she waived trial by

jury. After hearing the testimony of the witnesses and the arguments

of counsel, the court found the defendant guilty in manner and form

as charged in the information, entered judgment on the finding and

sentenced her to confinement in the County Jail for a term of four

months. The prosecution this writ of habeas corpus to reverse the judgment.

Section 126.10 (1) of Chapter 38, Ill. Rev. Stat. 1937,

reads: "No person shall obtain or attempt to obtain a narcotic

drug, or procure or attempt to procure the administration of a

narcotic drug " * * * by the use of a false oath or the filing of a

false address". Defendant urges that the allegation that defendant

gave a "false address" states a conclusion and without further allegations of fact does not charge a crime. She asserts that although the information may follow the language of the statute creating the offense, merely framing an information in the language of the statute is insufficient, unless the statute sets forth the particular acts constituting the crime. She insists that as the information failed to charge her with the commission of an offense, the court never acquired jurisdiction of the subject matter. There was no motion to quash the information, or in arrest of judgment, nor was there a request for a bill of particulars. Defects in an information that do not go to the real merits of the case on the question of the guilt or innocence of the accused are considered waived after judgment, when the sufficiency of the information is not questioned in the trial court. People v. Glassberg, 326 Ill. 379, 392; People v. Perca, 181 Ill. App. 666, 668. The general rule is that it is sufficient in an indictment or information to state the offense in the language of the statute. This rule, however, applies only where the statute sufficiently describes the crime. Where the statute creating the offense does not describe the act or acts which compose it, such acts must be specifically averred in the indictment or information. People v. Chiafreddo, 381 Ill. 214. We are of the opinion that in the case at bar the statute sufficiently describes the crime. Defendant states that the information should have alleged that she gave a certain named address, that such address was false and that she knew it was false. The words "unlawfully and intentionally" sufficiently allege that the defendant gave a false address knowingly for the illegal purpose of obtaining narcotics. We are of the opinion that the information is sufficient.

Defendant maintains that the court trying a defendant for a criminal offense, must fully inform such defendant of his or her constitutional right to a trial by jury as a condition precedent to the jurisdiction of the court to try the defendant without a jury. It will be observed that the defendant does not contend that she was not fully informed of her right to a trial by jury, or that she waived such right under any misapprehension. The record shows that she was present in open court, was represented by counsel and waived a jury trial. The defendant has not brought before us a report of the proceedings at the trial. The record imports absolute verity. In the absence of a report of the proceedings at the trial, we are bound to assume that the waiver of trial by jury shown by the record was understandingly made.

Finally, defendant states that "the jurisdiction of courts of special or limited jurisdiction must affirmatively appear on the face of the record." The Municipal Court of Chicago has jurisdiction to try and determine cases charging misdemeanors. We have held that the information in the instant case charges a misdemeanor. Hence, the court had jurisdiction to try and determine the case. Perceiving no error in the record, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HEBEL AND KILLEY, J.J. CONCUR.

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42437

319 I.A. 15

BENJAMIN D. RETHOLZ,
Appellant,

v.

YELLOW CAB COMPANY, a corporation,
SAM ABRAMS and LEROY A. JOHNSON,
Appellees.

Appeal from
Superior Court,
Cook County.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

April 12, 1940, plaintiff was a passenger in Chicago in a cab of the Yellow Cab Company, driven by defendant Sam Abrams. At or near the intersection of Walton Place and Michigan Avenue, the cab collided with an automobile owned and driven by defendant, Leroy A. Johnson. Both vehicles were going south in Michigan Avenue. Plaintiff was severely injured. July 16, he sued the cab company, Abrams and Johnson, and filed a complaint charging negligence in the operation and control of the respective vehicles and the violation of ordinances of the Chicago Park District and the statutes of Illinois.

The cause was tried by jury. Plaintiff testified in his own behalf. At the close of the evidence for plaintiff, on motion of defendant the court instructed the jury to return a verdict in favor of Johnson. The verdict was returned and judgment entered on it. At the close of all the evidence a motion of defendant Abrams and the cab company for a like instruction in their favor was denied. The cause as to them was submitted to the jury, which returned a verdict of guilty with damages assessed at \$200. Motions for a new trial were denied and judgment for plaintiff entered against the cab company and Abrams. Plaintiff appeals from both judgments.

As to Johnson, plaintiff contends the court erred in

HENRIETTA D. LITTON,
Appellant,

v.

YELLOW CAB COMPANY, a corporation,
JAM LARSEN and LEROY A. JOHNSON,
Appellees.

MR. JUSTICE MAHONEY delivered the opinion of the court.

April 12, 1940, plaintiff was a passenger in Chicago

in a cab of the Yellow Cab Company, driven by defendant and
Abrams. At or near the intersection of Wilson Place and Michigan
Avenue, the cab collided with an automobile owned and driven by
defendant, Leroy A. Johnson. Both vehicles were going south in
Michigan Avenue. Plaintiff was severely injured. July 18, he
sued the cab company, Abrams and Johnson, and filed a complaint
charging negligence in the operation and control of the respective
vehicles and the violation of ordinances of the Chicago Park
District and the statutes of Illinois.

The cause was tried by jury. Plaintiff testified in his
own behalf. At the close of the evidence for plaintiff, in order
of defendant the court instructed the jury to return a verdict in
favor of Johnson. The verdict was returned and jury was entered
on it. At the close of all the evidence a motion of defendant
Abrams and the cab company for a like instruction in their favor
was denied. The cause as to them was submitted to the jury, which
returned a verdict of liability with damages assessed at \$300. Motion
for a new trial was denied and judgment for plaintiff entered
against the cab company and Abrams. Plaintiff appeals from both
judgments.

As to Johnson, plaintiff contends the court erred in

directing a verdict. When the motion was made, plaintiff was the only occurrence witness who had testified. His evidence in substance was to the effect that about 7:15 P. M. on the day in question, he became a passenger in one of the cabs of the defendant cab company, driven by Abrams, to be driven to his home at 20 East Delaware Place; that he was driven at a speed of about 50 miles per hour; that he asked the driver to slow down and promised him a tip if he would do so, and that the driver slowed up a little; that the cab was about 40 feet in the rear of the automobile driven by Johnson; that the cab and the automobile were going south in the second lane from the curb; that as they approached the intersection of Walton Place and North Michigan Avenue the signal light was green for north and south traffic; that Johnson's car stopped suddenly without the driver giving any signal or warning; that the automobile was going about 40 miles an hour; that the district was built up; that the cab and the automobile collided; that plaintiff, who was sitting in the rear seat of the taxicab, was holding on to a strap on the right hand side of the cab; that the strap ripped and plaintiff was thrown into the air and on to the floor of the taxicab; that his head was bloody and his clothes covered with blood. He was helped out of the cab and taken to Henrotin Hospital, where he was treated.

We hold this evidence is sufficient to require a submission of the issues of fact between plaintiff and Johnson to the jury. It showed prima facie that in two particulars defendant Johnson was negligent in failing to comply with the provisions of the Illinois statutes by not giving a signal to the driver of the vehicle in the rear before making a stop and in driving at an excessive rate of speed. Ill. Rev. Stat., 1941, Chap. 95, §§65c, 66 and 67(3). Therefore, the issues should have been submitted to the jury. Shannon v. Nightingale, 321 Ill. 168; Purdy v. Hall,

investing a verdict. When the jury was called, the only evidence in the case was to the effect that about 11:15 p.m. on the night in question, he became a passenger in a car driven by the defendant and was taken to the home at 20 East Delaware Street; that he was driven at a speed of about 30 miles per hour; that he was taken to the home and promised him a tip if he would do so, and that the driver showed up a little; that the car was about 10 feet from the rear of the automobile driven by Johnson; that the car and the automobile were going south in the second lane from the curb; that as they approached the intersection of Union Street and North Michigan Avenue the signal light was green for north and south traffic; that Johnson's car stopped suddenly without the driver giving any signal or warning; that the automobile was being about 40 miles an hour; that the driver was built up; that the car and the automobile collided; that Johnson's car was stopped in the rear seat of the taxicab, was holding on to a strap on the right hand side of the cab; that the strap ripped and Johnson was thrown into the air and on to the floor of the taxicab; that his head was bloody and his clothes covered with blood. He was helped out of the cab and taken to Lenoir Hospital, where he was treated.

It is held that this evidence is sufficient to require a submission of the issues of fact between plaintiff and Johnson to the jury. It showed that Johnson was negligent in failing to comply with the provisions of the Illinois statutes by not giving a signal to the driver of the vehicle in the rear before making a stop and in driving at an excessive rate of speed. Ill. Rev. Stat., 1941, Chap. 48, § 3086, 66 and 67(3). Therefore, the issues should have been submitted to the jury. Johnson v. Northwestern, 311 Ill. 188; 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 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134 Ill. 298; Pullman Palace Car Co. v. Laack, 143 Ill. 242, 251; Sullivan v. Olhaver Co., 291 Ill. 359; and Housley v. Noblett, 234 Ill. App. 59, 63. Attorneys for Johnson suggest that merely stopping the auto may not be regarded as negligence and cite a line of cases where it has been held that under circumstances appearing in each of the cases, mere parking of an automobile in the road is not negligence. These cases are quite distinguishable from a case like this, where the evidence justifies an inference of negligence.

Again, it is urged the negligence of Johnson, if any, was not the proximate cause of plaintiff's injuries. This question also was for the jury. The instruction to return a verdict in favor of Johnson and the entering of a judgment on the verdict against plaintiff must be held erroneous. The judgment in favor of Johnson must be reversed. Under Section 92 of the Civil Practice Act (Smith-Hurd Anno. Stat., Chap. 110, par. 216) it does not necessarily follow that the judgment against the cab company and Abrams must be reversed. Plaintiff, however, contends that this judgment should be reversed also, because the damages allowed are insufficient and because of other errors in the trial. We hold the damages allowed to plaintiff are inadequate. The evidence produced by him tended to show that he was in perfect physical condition before the accident. As a result of the collision of the vehicles he was violently thrown to the floor of the cab in which he was riding and from head to foot was covered with blood. His knee was bruised and bleeding. There was a gash on his head three inches long. He was taken to Henrotin Hospital where it was sewed up by four stitches. He was given an anti-tetanus injection and taken to his home. Next morning he saw Dr. Corbett, who caused X-rays to be taken of his head and spine. He saw Dr. Corbett seven times in the two weeks following the accident. During August he was treated by Dr. Shambaugh. He had pains in his neck, head and

shoulder. Dr. Shambaugh sent him to an X-ray laboratory where X-rays were taken of his head and neck. In April, 1940, he consulted Dr. Niemann three times. The stitches remained in his forehead about a week or ten days and were taken out at Dr. Corbett's office. He gave away his hat and clothes, which were ruined in the accident and which, he testified, were of the value of \$95. For the first treatment at Henrotin Hospital he paid \$5.50. It is significant in this connection that these defendants in their answer averred as one of their defenses that they had settled with the plaintiff for the sum of \$350. A judgment grossly inadequate in the amount of damages allowed is reversible just as a judgment grossly excessive would be. Montgomery v. Simon, 309 Ill. App. 516; Luner v. Gelles, 314 Ill. App. 659; Dimick v. Schiedt, 293 U. S. 474, 486.

Instruction No. 1, given at the request of the defendants, is subject to criticism in that it particularly pointed out the testimony of plaintiff and called attention of the jury in that connection to the fact that it had a right to take into consideration that plaintiff was interested in the result of the suit. This was error, plaintiff and defendant Abrams both being natural persons. Doellefield v. Travelers Ins. Co., et al., 303 Ill. App. 123.

For these reasons the judgment must be reversed, although we think it altogether probable the inadequate damages allowed by the jury were brought about by plaintiff's own conduct. He himself was an attorney. Wisely, he employed an attorney to represent him in the case. Unwisely, he insisted on participation in the trial, notwithstanding admonitions from the trial judge. The truth of the old adage about the lawyer who tries his own case was again demonstrated. However, the errors pointed out require reversal of

shoulder. Dr. Spemann sent him to an X-ray laboratory where X-rays were taken of his head and neck. In April, 1940, he consulted Dr. Wiemann three times. The stitches remained in his forehead about a week or ten days and were taken out at Dr. Corbett's office. He gave away his hat and clothes, which were ruined in the accident and which, he testified, were of the value of \$25. For the first treatment at Memorial Hospital he paid \$25.00. It is significant in this connection that these defendants in their answer averred as one of their defenses that they had settled with the plaintiff for the sum of \$500. A judgment grossly inadequate in the amount of damages allowed is reversible just as a judgment grossly excessive would be. Montgomery v. Simon, 308 Ill. App. 518; Inner v. Gelles, 314 Ill. App. 629; Dinick v. Schieft, 223 U. S. 474, 480.

Instruction No. 1, given at the request of the defendants, is subject to criticism in that it particularly pointed out the testimony of plaintiff and called attention of the jury in that connection to the fact that it had a right to take into consideration that plaintiff was interested in the result of the suit. This was error, plaintiff and defendant Adams both being natural persons. Doelfield v. Travelers Ins. Co., et al., 303 Ill. App. 123.

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both judgments. The judgments will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Niemeyer, J., concurs.

O'Connor, P.J.: I agree with the result but not in what is said in reference to Instruction No. 1.

both judgments. The judgments will be reversed and the cause remanded for another trial.

REVEREND AND HONORABLE,

Witness my hand, this 1st day of January,

O'Connor, J. I. I agree with the result but not in what is said

in reference to instruction No. 1.

41984

JOSEPH BROCKMAN,

Plaintiff - Appellee,

~~V.~~
THE PEOPLES GAS LIGHT AND COKE
COMPANY and JOHN M. GALLAGHER,

Defendants - Appellants.

319 I.A. 115²
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a personal injury action with judgment for plaintiff on a verdict for \$35,000.00. The defendants have appealed.

Trial was had on plaintiff's amended complaint charging negligence and willful and wanton conduct. The answers of the defendants denied negligence, willful and wanton conduct and in the alternative charged that if they were guilty of willful and wanton conduct, plaintiff was guilty of contributory willful and wanton conduct; and alleged that plaintiff placed himself in peril with conscious indifference to his safety and a conscious willingness to incur injury, which conduct contributed to the proximate cause of his injuries. The willful and wanton count was withdrawn before the case went to the jury. The plaintiff did not testify as an occurrence witness because he said he had no recollection of any of the circumstances leading to or surrounding the accident.

The occurrence witnesses for plaintiff were Wennerstrom and Palmer, a cab driver, and for defendant, Gallagher the driver of the Company truck and Niemec who was driving behind Gallagher at the time of the accident. The evidence as to the speeds of the respective cars, the circumstances of the impact and of drinking on the part of plaintiffs and his companions, is in conflict. Enough testimony is undisputed from which a general description of the accident is possible.

JOSEPH BLOCKMAN,

Plaintiff - Personal

THE TROPIC PALM RESTAURANT AND CO.
COMPANY and JOHN W. BLOCKMAN,

Defendants - Personal

MR. JUSTICE VILLYN, JUDGE OF THE COURT.

This is a personal injury action with judgment for
plaintiff on a verdict for \$50,000.00. The defendants have
appeared.

Trial was had on plaintiff's amended complaint on being

negligence and willful and wanton conduct. The plaintiff
defendants denied negligence, willful and wanton conduct and in
the alternative charged that if they were guilty of willful and
wanton conduct, plaintiff was guilty of contributory negligence and
wanton conduct; and alleged that plaintiff placed himself in peril
with conscious indifference to his safety and a conscious willingness
to incur injury, which conduct constituted the proximate cause
of his injuries. The willful and wanton conduct as alleged before
the case went to the jury. The plaintiff did not testify as an
occurrence witness because he said he had no recollection of any
of the circumstances leading to or surrounding the accident.
The occurrence witnesses for plaintiff were Benson, Brown
and Palmer, a cab driver, and for defendant, William the driver
of the Goodyear truck and Hines who was driving leading witness
at the time of the accident. The evidence as to the facts of
the respective cases, the circumstances of the accident and of injury
on the part of plaintiff and his companions, is in conflict.
Enough testimony is undisputed from which a general conclusion
of the accident is possible.

On December 13, 1939, plaintiff, Wennerstrom, Sheehan, Palmer and Erickson, W. P. A. employees working at the Chicago State Hospital on West Irving Park boulevard, were southbound on North California avenue about 7 P.M. in Wennerstrom's automobile, a 1934 Plymouth purchased four days before. Wennerstrom was driving, with plaintiff sitting in the right front seat and the other three men in the rear seat. They had finished work about 4:30 P.M. had met later in Berky's Tavern at 3415 West Irving Park boulevard and after spending some time there, were riding to 400 South Peoria street to get Christmas cards which they had purchased from Palmer. The streets were dry. The dim lights on his automobile were lighted and apparently the intersection of California and Chicago avenues, which the car was approaching, was well lighted. Defendant Gallagher was driving a Gas Company truck east on Chicago avenue, with the wheels of the truck straddling the south rail of the eastbound tracks. Wennerstrom's car and the Company truck collided on the south side of Chicago avenue, a little east of the center of California avenue. The passenger automobile overturned several times and plaintiff was seriously injured.

Defendants moved for directed verdicts at the close of plaintiff's case and at the close of all the evidence. Both motions were denied. It is defendants' contention that the element of plaintiff's due care was not proved, since plaintiff, himself, had no memory of any circumstances of the accident and no one else testified that plaintiff did or said anything at, or immediately prior to, the accident. They say the truck came from plaintiff's right and had he elected, he could have seen it more readily than the driver and, since he had not shouted or warned the driver in any way, it would appear that he had not looked although he had

opportunity; that as a consequence there was no proof of his due care. We cannot agree because that element could be inferred from other circumstances in the case in the absence of plaintiff's testimony. (Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505).

Wennerstrom testified that he saw the truck both before he commenced to cross and just before the impact. The inference could easily be drawn that, under those circumstances, nothing the plaintiff could have done would have aided in any way to avoid the accident. It may be that the plaintiff believed that any warning would hamper the driver and the jury might infer that any warning or shouting or any other effort on the part of plaintiff, would have served only to confuse the driver or to increase the danger and may have inferred that due care required that plaintiff be quiet. To sustain defendants' position would require us to say that there is no evidence tending to prove that element. The nature of the case renders direct evidence impossible and the testimony of Wennerstrom has sufficient from which any inferences of due care or lack of it may be drawn. We think the motions were properly denied. The defendants rely on Opp v. Pryor, 294 Ill. 538, a similar case, to sustain their contention on this point. It is sufficient to distinguish the cases on the point that the driver there testified that she looked and did not see the train coming. We cannot say as a matter of law there was lack of due care on plaintiff's part.

This case must be retried. It presented issues of fact in great conflict, and a very serious injury. Under these circumstances it is essential that the trial be free from error or prejudice. The court in giving the following instructions, plaintiff's Nos. 1 and 2, committed reversible error. The first is as follows:

"If you believe from the evidence, under the instructions of the court, that the plaintiff was riding as a passenger in an automobile which was being operated southward at the time of the accident complained of in this case, and that he was then and there, and at all times prior thereto, in the

exercise of ordinary care for his own safety, and if you further believe from the evidence that the defendants were guilty of negligence in the management and operation of their truck, at the time and place in question, as charged in plaintiff's declaration, and that such negligence, if you find that the defendants were negligent, proximately caused, or contributed to cause, the collision in question and the injury, if any, to the plaintiff, then the plaintiff is entitled to recover against the defendants in this case, even though you further believe from the evidence that the driver of the automobile in which plaintiff was riding as a passenger, as aforesaid, was also guilty of negligence which contributed to cause the collision in question."

The second is:

"The court instructs the jury that, if you find and believe, from the preponderance of the evidence, that the defendants were operating their truck, at the time in question, at a greater rate of speed than was reasonable and proper, having regard for the traffic and the use of the way, so as to endanger the life and limb of any person, and, in so doing, were guilty of negligence, as a direct result of which plaintiff was injured, if you so find, then you should find for the plaintiff, provided it is found that he was in the exercise of ordinary care for his own safety."

The effect of these instructions was to tell the jury that plaintiff was a guest, to whom Wennerstrom's negligence, if any, could not be imputed. It eliminated from the consideration of the jury an element at issue which was required to be decided adversely to defendants before plaintiff was entitled to recover. There was evidence that plaintiff and his companions were engaged in a joint enterprise, (Restatement of Torts p. 1277; Grubb v. Ill. Terminal Co., 366 Ill. 330), and the question was for the jury. Were the jury to find defendants guilty of negligence and still find that plaintiff and his companions were engaged in a joint enterprise, and further find that Wennerstrom was negligent, then the latter's negligence was imputable to plaintiff so as to bar his recovery. No other instructions given could cure the error. Hanson v. Trust Company of Chicago, 380 Ill. 194.

In aid of the second trial, we call attention to the circumstances surrounding the testimony of plaintiff's expert witness, a neurologist. He examined plaintiff for the first time, two and one-half weeks before the first trial, confining

his examination to plaintiff's brain and nervous system. He testified that he found the pupil of plaintiff's right eye larger than that of the left and both sluggish to light; that plaintiff's eyes, when he was asked to look to the left, veered back and forth from right to left and that his reflexes were exaggerated. As a result of his examination he concluded that plaintiff had had a "brain involvement", most likely concussion. In answer to a hypothetical question containing a recital of plaintiff's dizzy spells, headaches and blurring of the eyes, difficulty in putting his head backward or lying down, the neurologist gave as his opinion that plaintiff's condition was caused or could have been caused by the accident. Defendants moved to strike the testimony regarding the exaggerated reflexes and movements of the eyes on the ground that the movements were in the control of plaintiff and, accordingly, subjective rather than objective. The motion was denied. The doctor based his conclusion of plaintiff's condition "upon my findings". The findings were substantially, the exaggerated reflexes and veering of the eyes. There is a dispute whether the doctor's testimony is admissible, defendants claiming that it is not since it was based at least in part upon subjective symptoms, plaintiff claiming that the doctor testified only to objective findings and not to any statement by the plaintiff. Following defendants' motion to strike, the following colloquy took place:

"The Court: Are you testifying to the objective finding or subjective?

The Witness: Exclusively objective.

The Court: It may stand."

The reflexes which the witness claimed were exaggerated were tested in the usual way, by tapping the patient's leg about the knee and "end phalanx" of the middle finger of the hand and observing respectively the movement of plaintiff's leg and the other fingers

of the hand. Our courts have held that physical manifestations in the control of the patient, as well as statements of the plaintiff, are subjective symptoms, (Greinke v. Chicago City Ry. Co., 234 Ill. 564) and that expert conclusions based on finding partial objective and partial subjective are not permitted, Wells Brothers v. Industrial Commission, 306 Ill. 191, but there is authority for admitting expert testimony of reflexes under proper circumstances. Schmidt v. Chicago City Ry. Co. 239 Ill. 494; Goldberg v. Capitol Freight Lines, 47 N. E. (2) 67. It is true that the doctor said that, excluding the physical manifestations, the other symptoms were sufficient for his conclusion, but, under the circumstances, we cannot but feel that the doctor's testimony as a whole was not helpful to a proper determination of the case. His conclusion was that the examined had had a brain involvement, most likely concussion, and that there were brain changes with no hope of recovery. It may be that the jury understood that as a result of the accident, plaintiff's brain was injured, the injury caused certain changes in it which were permanent and that these changes brought about the headaches, dizziness and blurring and specks before the eyes. The best safeguard against error in the terms of expert medical testimony is close attention to and control by the court of the witnesses. Opp v. Pryor, 294 Ill. 538. It was improper for the court to ask the witness to determine whether the latter's testimony was based on objective or subjective findings. The court, because of the nature of the testimony, should have been especially careful, for the average person, who must be considered as the average jurymen, has little, if any, knowledge of the wonderful structures and functions of the senses, nervous system and brain. The highly technical language involving medical, psychological and psychiatric terms should be reduced so far as possible to lay terms. Certainly, no injury can be more painful and dreadful in its effect than a brain injury, and plaintiffs are entitled to have the benefit of every legal element of damages, but justice in compensation can be attained only by the court's control of the witnesses and testimony, so that the jury may understand and that no prejudice may result.

of the hands. Our courts have held that physical examinations in the control of the patient, as well as statements of the patient, are competent evidence. (Greene v. Chicago City, 100 Ill. 384) and that expert conclusions based on physical evidence of injury and external subjective are not permitted. (Chicago City v. Chicago City, 100 Ill. 384) but there is authority for admitting expert testimony of reflexes under proper circumstances. (Chicago City v. Chicago City, 100 Ill. 384; Goldberg v. Chicago City, 100 Ill. 384) It is true that the doctor said that, regarding the reflexes, the other symptoms were sufficient for his conclusion, but, under the circumstances, we cannot but feel that the doctor's testimony as a whole was not helpful to a proper determination of the case. His conclusion was that the examined had had a brain involvement, most likely concussion and that there were brain changes with no hope of recovery. It may be that the jury understood that as a result of the accident, Plaintiff's brain was injured, the injury caused certain changes in it which were permanent and that these changes brought about the headache, dizziness and blurring and double before the eyes. The next testimony against error in the terms of expert medical testimony is given attention to and control by the court of the witness see, Greene v. Chicago City, 100 Ill. 384. It was improper for the court to ask the witness to determine whether the latter's testimony was based on objective or subjective findings. The court, because of the nature of the testimony, should have been especially careful, for the average person, who may be considered as the average jurymen, has little, if any, knowledge of the anatomical structure and functions of the sense, nervous system and organs. No highly technical language involving medical, psychological and anatomical terms should be reduced so far as possible to lay terms. Certainly, no injury can be more painful and dreaded in its effect than a brain injury, and Plaintiff is entitled to have the benefit of every legal element of damages, but justice in compensation can be attained only by the court's control of the witnesses and testimony, so that the jury may understand and that no prejudice may result.

The hypothetical question propounded to and answered by the neurologist did not include all of the disputed facts. Defendants are in no position to complain, however, because they did not object to the doctor testifying before plaintiff was cross-examined. The facts not included in the hypothetical question were developed on cross-examination.

We have not considered the questions of weight of the evidence, whether the verdict was excessive, and need not consider the question of propriety of an amendment allowed but not made, nor of refusal to grant a new trial.

For the reasons given the judgment is reversed and the cause is remanded for a new trial with directions to proceed in accordance with the principles outlined herein.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

BURKE, P.J. AND HEBEL, J. CONCUR.

The hypothetical question proposed to the jury of the
neurologist did not involve any of the alleged facts. The
facts are in no position to contain, however, as they do not
object to the doctor testifying before the jury. The facts
the facts not included in the hypothetical question were
on cross-examination.

We have not considered the question of the
evidence, whether the verdict was excessive, and need not consider
the question of propriety of an award of damages. The
non of refusal to grant a new trial.

For the reasons given the judgment is reversed and
the cause is remanded for a new trial with instructions to proceed
in accordance with the principles outlined herein.

JUDGMENT FOR THE PLAINTIFFS
REVERSED AND REMANDED.

BURKE, P. J., and BROWN, J. CONCUR.

42042

TAFT DORSEY,

Appellee,

v.

BORIS KRILOFF and SAM NEWMAN,
doing business as BORIS TAVERN,

Defendants.

On Appeal of UNDERWRITERS AT LLOYDS
and JOHN S. LORD, Attorney in Fact,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

319 I.A. 116

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding upon plaintiff's judgment for \$5,000.00 against defendants Kriloff and Newman in a dramshop action. The defendants were insured by Lloyd's, garnishees, and plaintiff, garnisher, in a trial without a jury, had judgment for \$5,000.00, and garnishees appeal.

Defendants operated a tavern on Indiana avenue in premises leased from Sam Much. March 29, 1938, plaintiff was injured in a fight in the tavern and sued defendants and Much in a dramshop action. Ekern & Myers, attorneys, were employed by the garnishees to represent defendants. Subsequently, on July 28, 1939, Ekern & Myers wrote defendants that further investigation of the case showed that at the time of the accident plaintiff was an employee; that, accordingly, the accident was not covered by the policy issued by garnishee; that they were to withdraw as attorneys, and that unless defendants made arrangements to defend themselves, plaintiff would take a default judgment.

August 29, 1939, Kriloff wrote Ekern & Myers that he and Newman intended to hold the garnishees responsible for any judgment; and that Dorsey did not work for defendants alone, but for others also. Sam Much appeared in the dramshop action by Rudnick & Wolf, attorneys. The record shows that September 11, 1939, Ekern & Myers withdrew their appearance; February 28, 1940, the action was

1940

Defendants

v.

JOHN W. MYERS and JAMES H. MYERS
doing business as MYERS & MYERS

Defendants

On Appeal of JUDGMENT NO. 100
and JURY NO. 100, entered in Book

As plaintiffs

JOHN W. MYERS and JAMES H. MYERS

doing business as MYERS & MYERS

100-100

This is a garnishment proceeding under Plaintiff's Judgment for \$5,000.00 against defendant Myrtle and Myrtle in a garnishment action. The defendant were insured by Myrtle's, Myrtle's, and Myrtle's, in a trial without a jury, and judgment for \$5,000.00, and garnishment appeal.

Defendants operated a tavern on Indiana Avenue in premises leased from Sam Much. March 28, 1938, Plaintiff was injured in a fight in the tavern and sued defendant and Much in a damages action. Myrtle & Myrtle, Myrtle's, Myrtle's, and Myrtle's, were employed by the defendants to represent defendant. Subsequently, on July 28, 1938, Myrtle & Myrtle wrote defendant that further investigation of the case showed that at the time of the accident Plaintiff was an employee; that, accordingly, the accident was not covered by the policy issued by Myrtle's; that they were to withdraw as attorneys, and that unless defendant made arrangements to defend themselves, Plaintiff would take a default judgment.

August 22, 1938, Plaintiff wrote Myrtle & Myrtle that he and Newman intended to hold the garnishment responsible for any judgment; and that Myrtle did not work for defendant alone, but for others also. Sam Much appeared in the damages action by Myrtle & Myrtle. The record shows that September 17, 1938, Myrtle & Myrtle withdrew their appearance; February 28, 1940, the action was

dismissed for want of prosecution; March 1, 1940, by stipulation of plaintiff's attorneys and Rudnick & Wolfe, the dismissal order was vacated and the cause was reinstated and set for trial April 22, 1940; May 13, 1940 Judge McGoorty again dismissed the cause for want of prosecution; May 14, 1940 Judge McGoorty vacated the dismissal order and set the cause for trial May 31, 1940; June 7, 1940 a jury gave verdict for plaintiff for \$1,000.00 upon which Judge Schwaba entered judgment against defendants; June 19, 1940, Judge Schwaba, after notice by Rudnick & Wolf to plaintiff's attorneys, dismissed the cause as to Much; June 26, 1940 on plaintiff's motion and notice to defendants a new trial was granted and set for June 28, 1940 by Judge Schwaba; and November 8, 1940, Judge Lindsay following an ex parte trial, entered judgment for plaintiff on verdict against defendants, for \$5,000.00.

The questions are whether the plaintiff at the time of his injury was an employee of defendants or acting in their behalf; and whether the judgment was void for procedural reasons.

The insurance policy indemnified defendants against liability under the Dram Shops Act to any person or persons "other than an employee or employees of the assured or any one acting on behalf of the assured."

Undisputed evidence shows that plaintiff contracted with defendants to watch their place of business; that he was associated with the Metropolitan Detective Agency; that at the time of the injury he performed watching service for thirty-four stores, buildings and garages in the vicinity of defendants' tavern, for which his compensation varied; that defendants paid him \$4 per week; that he guarded against holdups, robberies, burglaries, tested windows and doors after closing hours; that he would be in and out of the

dismissed for want of prosecution; March 1, 1940, a judgment of plaintiff's attorneys and judgment a writ, the dismissal order was vacated and the cause was reinstated and set for trial April 22, 1940; May 13, 1940 Judge McGowan again dismissed the cause for want of prosecution; May 14, 1940 Judge McGowan vacated the dismissal order and set the cause for trial May 17, 1940; June 7, 1940 a jury gave verdict for plaintiff for \$1,000.00 upon which Judge Cowhale entered judgment against defendant; June 13, 1940, Judge Cowhale, after notice by defendant to plaintiff's attorneys, dismissed the cause as to which; June 22, 1940 on plaintiff's motion and notice to defendant a new trial was granted and set for June 28, 1940 by Judge Cowhale; and November 2, 1940, Judge Lindsey following an ex parte trial, entered judgment for plaintiff on verdict against defendant, for \$1,000.00.

The questions are whether the plaintiff at the time of his injury was an employee of defendant or acting in their behalf; and whether the judgment was void for procedural reasons.

The insurance policy indemnified defendant as third liability under the term "hope not to any person or persons" other than an employee or employees of the assured or any one acting on behalf of the assured."

Undisputed evidence shows that plaintiff contracted with defendant to watch their place of business; that he was associated with the Metropolitan Detective Agency; that at the time of the injury he performed watching service for thirty-four stores, buildings and garages in the vicinity of defendant's tavern, for which his compensation varied; that defendant paid him \$4 per week; that he guarded against holdups, robberies, burglaries, tested windows and doors after closing hours; that he would be in and out of the

tavern several times a night; that he had never evicted anyone from the tavern; that the night of the injury he accommodated the bartender by asking a patron to remove his feet from the table and the altercation ensued. The only dispute in the evidence is between the testimony of Krilloff and plaintiff at the trial and in their depositions two years earlier. Their earlier testimony indicates that in addition to watching, plaintiff had the duty of preserving order in the tavern, for which he was paid extra compensation; that if there was disorder he would attempt to "hush" it before suggesting the police be called; and that the night in question he went into the tavern when he heard noise, and those who injured him were "real noisy and drunk".

We believe that under the circumstances of plaintiff's relationship with defendants and his admission that he was injured while accommodating the bartender, he was clearly acting on behalf of the assured and we hold, therefore, as a matter of law, that Lloyds, garnishees, are not liable under the terms of the policy. It is unnecessary to decide any other points.

For the reasons herein given the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

BURKE, P.J. AND HEBEL, J. CONCUR.

It is unnecessary to decide any other points. Lloyd's, Karmishnee, are not liable under the terms of the policy, of the assured and we hold, therefore, as a matter of course, while acknowledging the 25th day, no part of the policy is in relation with defendant and it is held that no part of the policy We hold that under the circumstances, it is held.

For the reasons herein stated, the above-named deceased and his

Court is reversed.

BUKRE, J. A. AND J. C. CULLEY

42119

MARIE F. CULLERTON, Administratrix of
the Estate of John F. Cullerton,
Deceased,

Appellant,

v.

DILLWYN M. BELL,

Appellee.

319 I.A. 117

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the administratrix from an order denying her petition for a body execution against Bell. The petition is based on so-called findings of fraud on Bell's part in a decree entered February 3, 1937, which ordered Bell to pay John F. Cullerton, since deceased, \$24,500 in 30 days and in default of payment, Bell to show cause why he should not be attached for contempt.

The questions are whether findings in the decree justify the body execution; and whether plaintiff's instant action is barred by estoppel.

In a prior proceeding plaintiff filed a petition for a rule upon Bell who had defaulted in payment to Cullerton and the trial court found Bell guilty. That order was appealed from and this court (Meaden and Cullerton v. W. J. Anderson Corp., 301 Ill. App. 390), reversed the order because, " *** we would not be warranted in finding that Cullerton lost his \$24,500 through fraud on the part of Bell". The history of the foundation proceeding may be had by reference to that decision.

The parties are the same in this proceeding as in that prior case and the same decree is the basis of both actions. The form of the relief sought is different, but the determining issue is the same in each, that is, the alleged fraud of Bell. The

MARIN T. GULLERTON, Administrator of
the Estate of John T. Gullerton,
Deceased,

Appellant,

v.

DILLWYN M. BELL,

Appellee.

MR. JUSTICE KILPATRICK delivered the opinion of the court.
This is an appeal by the administrator from an order

denying her petition for a body execution against Bell. The
petition is based on so-called findings of fraud on Bell's part
in a decree entered February 7, 1934, which ordered Bell to pay
John T. Gullerton, since deceased, \$4,500 in 30 days and in
default of payment, Bell to show cause why he should not be
attached for contempt.

The questions are whether findings in the decree justify
the body execution; and whether plaintiff's instant action is barred
by estoppel.

In a prior proceeding plaintiff filed a petition for a
rule upon Bell who had defaulted in payment to Gullerton and the
trial court found Bell guilty. That order was reversed and
this court (Madgen and Gullerton v. M. J. Anderson and Bell, 304 Ill.
App. 280), reversed the order because, " *** we would not be warranted
in finding that Gullerton lost his \$4,500 through fraud on the
part of Bell." The history of the foundation proceeding may be
had by reference to that decision.

The parties are the same in this proceeding as in that
prior case and the same decree is the basis of both actions. The
form of the relief sought is different, but the legal issues
is the same in each, that is, the alleged fraud of Bell. It

decision of the First Division of this Court in the prior proceeding, finally determined the question of Bell's fraud ^{under} ~~in~~ the findings in the decree. Little v. Blue Goose Motor Coach Co., 346 Ill. 286. It decided as a matter of law that the decree was susceptible of the construction that Cullerton's money was not lost through fraud of Bell. There can, therefore, be no basis for this proceeding under section 5, Chap. 77, Ill. Rev. Stats. 1941 since the instant petition rests on the alleged finding, in the decree, of fraud on the part of Bell.

We need consider no other point and the judgment is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEBEL, J. CONCUR.

decision of the first division of the Court in the proceedings
 under
 finally determined the question of the validity of the findings
 in the decree. Little v. Blue, 100 U.S. 111, 1871.
 It decided as a matter of law that the decree was susceptible of
 the construction that the petitioners' money was not lost through fraud
 of Hall. There is, therefore, no basis for the proceeding
 under section 5, Chas. 78, 1871, and, after that time the instant
 petition rests on the alleged finding in the decree, or upon an
 the part of Hall.
 We need consider no other point and the judgment is

herely affirmed.

THE COURT: 111.

BURKE, J. J. AND WHEEL, J. CONCUR.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

February Term, A. D. 1943.

Abstract

Term No. 42035

Agenda No. 22

ELIZABETH HARPER and
MILDRED MOORE,

Plaintiffs-Appellees,

vs.

TONY MALANDRONE,

Defendant-Appellant.

312 I.A. 247

Appeal from the

Circuit Court of

Williamson County

BRISTOW, J.

This is an appeal by the defendant, TONY MALANDRONE, from a judgment rendered against him in favor of the Plaintiff, ELIZABETH HARPER, for \$3,000.00 and the Plaintiff, MILDRED MOORE, for \$500.00, in a suit for personal injuries sustained in Ohio, August 17, 1940, when an automobile, in which all parties to this suit were riding, and which was being driven by Defendant-Appellant herein, in an easterly direction, collided head-on with another automobile proceeding in a westerly direction.

Appellees, as invited guest of Appellant, were riding in the back seat while enroute from their home in Herrin, Illinois, through Indianapolis and Richmond, Indiana, intending to proceed to the State of Delaware. The collision occurred about six miles east of Richmond, Indiana, and about a couple of miles east of the state line.

The second amended complaint had four counts. The complaint alleged such relationship of invited guests; that there was heavy traffic of motor vehicles on the two lane paved highway for many miles and up to and at the place of collision; that defendant drove his automobile eastward at a high, excessive and dangerous rate of speed; that an automobile just ahead obscured Defendant's visibility to the east; that it was his duty to drive and operate his automo-

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bile so as not to wantonly injure plaintiffs, but in violation thereof and having knowledge of the dangerous position of said guests, Defendant drove wantonly at high, excessive and dangerous rate of speed and wantonly drove to the left upon the west bound traffic lane, attempting to pass the preceeding car and wantonly drove his automobile to the north without being assured of a clear distance ahead whereby he wantonly collided there with a west bound automobile. Count 3 further alleged that defendant having knowledge of the dangerous position of his guests, wantonly and wilfully violated certain sections of the Statutes of Ohio specifically referred to in the complaint by section number; and that as a direct and proximate result of such wanton violation, plaintiffs were injured.

Defendant's answer denied charges of wanton misconduct; alleged the duty to not drive so as to wantonly injure plaintiffs, was to be interpreted by decisions of Ohio. The answer filed additional defenses setting up the Ohio Guest Statute, citing and quoting from decisions of Courts of Appeal of Ohio; averring that defendant was not guilty of wanton misconduct, that at the time defendant did not have actual knowledge of the peril which resulted in the collision; that after acquiring actual knowledge of such peril that defendant did not fail to exercise any care for the safety of plaintiffs; that defendant did not have any actual knowledge of the approach of said car with which he collided; that after acquiring knowledge that said west bound traffic was not clear, the defendant did not fail to exercise any care whatever. No reply to this answer was filed.

Appellant contends that the judgment should be reversed because of error in giving instructions for plaintiff, refusing instructions for defendant; and in admitting improper evidence, and because plaintiffs failed to prove by the greater weight of the evidence that the injuries were due to wanton misconduct of defendant.

There was a sharp conflict between witnesses for plaintiffs and defendant as to the actions of defendant leading up to and resulting in the collision. The Defendant testified that for a distance of about two miles before the accident he had been driving at the rate of 53 miles an hour, 75 to 90 feet behind the car which immediately preceded him which bore a California license. He stated that after he had left Richmond the road was crooked, and there were several cars in the east bound line of traffic until the Dayton Road was reached. It was here that the California car was left in front of him after all other cars had turned south on said road. He further testified that the car in front of him suddenly flashed its red lights and wobbled back and forth; that he applied his brakes, turned to the left after looking and determining that no car was coming from the east; and that a car then came from the east up a hill, the top of which was 475 feet east of him, and ran into a mail box on the north side 37 steps east of the point where the defendant car and the west bound car collided; and that he was not trying to go around the California car.

There was testimony on behalf of plaintiffs that all the way from Indianapolis and at the time of the collision, traffic on this highway was very heavy, and that many vehicles were traveling in a westerly direction; that the sun was shining; the pavement was dry; that the California car was about 15 feet in front of defendant's car immediately before the accident; that the witness observed the California car about a block away; and that it did not wobble and that defendant's car pulled up to within 15 feet of the California car; and that there was no slowing down of the automobiles. Another witness said there was a steady stream of passing cars along there; that defendant's car suddenly swerved to the left, and when it swerved, witness saw a car in front of them, and they came together with a terrific impact. The California car did not stop, and it was east of the point of impact.

Witnesses testified that defendant's car was traveling from 50 to 60 miles per hour and had traveled at such rate of speed, except through cities, most of the distance after starting the trip.

There was testimony of several witnesses that some time after the accident defendant promised to pay hospital bill, doctors and other bills and expenses.

It was agreed and stipulated that the law of Ohio controlled the question of liability. The "Guest Statute," of Ohio, Ohio General Code, Sec. 6308-6 was as follows: "The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest while being transported without payment therefor in or upon said motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wilful or wanton misconduct of such operator, owner, or person responsible for the operation of said motor vehicle."

Wantonness and wilfulness in connection with the Ohio Guest Statute is discussed in several recent decisions of the Courts of Ohio: Jenkins v. Sharp, 140 Ohio St. 164, 42 N. E. (2d) 755, 757-758; Haacke v. Lease, 41 N. E. (2d) 590; Morrow v. Hume 131 Ohio St. 319, 3 N.E. (2d) 39; Meisner v. Dillon, 43 N.E. (2d) 305; Murphy v. Snyder, 63 Ohio App. 423, 27 N.E. (2d) 152, 155-156. In Fischer v. Faflick, 52 Ohio App. 69, 3 N. E. (2d) 63, at page 64, the Court said: "Whether the driver used any care after the peril was discovered is the issue."

Appellee contends that the peril in the instant case existed before and continued after appellant put on his brakes, if he did, and turned into the west bound traffic lane. In the case of Haacke v. Lease, supra, at page 599, the Court, in discussing whether any evidence most favorable to plaintiff^{on the} question of wilful or wanton conduct under the Guest Statute existed, said, "There were no facts that implied a failure on his part to exercise care when he had knowledge of any great probability

of harm to the persons which the exercise of care would avert, nor did the facts exhibit a reckless disregard upon his part of the consequences." It seems to us that the facts in the case at bar show just the contrary.

In the cited Ohio cases, the uncontradicted evidence showed: in one case, a lack of knowledge of an impending danger; in another, no knowledge that the automobile door was not closed; in another, there was no knowledge of the slippery condition of the road; and still another, where the driver of an automobile was suddenly blinded by lights of an on-coming car. In the instant case, the defendant had full knowledge of the stream of automobiles coming from the east and knew that to turn north into that lane of traffic would necessarily subject those persons riding in his car to great peril and probability of harm. Heedlessly, the defendant traveling at a rate of speed of 50 to 60 miles an hour, closely behind another automobile, without first determining that the road way was clear, turned into the north lane of traffic, and caused the accident in question. The defendant says he did not see the car approaching from the east. The law charges a person with the duty of seeing that which is clearly visible and within the range of vision. Reed vs. Lyford, 311 Ill. App. 436, 439. Failure to discover danger through recklessness may be wilful or wanton misconduct. Layton v. Oganoski, 256 Ill. App. 462, 469. The rule of wilful or wanton misconduct in Illinois is much like that discussed in the Ohio decisions. Walldren Express Co. v. Krug, 291 Ill. 472, 478. It is a question for the jury whether it is wanton conduct to attempt to pass a car ahead, without first looking and observing the approaching car in the other lane of traffic and driving into such other lane and into collision with the coming car. Schachtrup v. Hensel, 295 Ill. App. 303, 313.

We are of the opinion that there was sufficient evidence

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in this case, if believed, to warrant the jury in finding the defendant guilty of wanton and wilful misconduct as defined by the Ohio law. The verdict was not against the manifest weight of the evidence, and there no error committed by the trial court in refusing the defendant's motions to direct a verdict in its behalf.

Defendant further contends that this judgment should be reversed because the complaint did not contain a recital of the Ohio Guest Statute or Ohio decisions; that same were set up in the answer as affirmative defense and that no reply was filed thereto. We think that the complaint was properly drawn; and that the presumption was that the Illinois law and the Ohio law were identical, before any difference was raised by the answer. The trial proceeded upon the bill and answer as filed, a stipulation was entered into between counsel for the plaintiff and defendant covering the subject as to what the law of Ohio was, and finally the jury was properly instructed upon that subject. We do not believe that if a reply were necessary that such failure can now be urged. Cairo Lumber Co. v. Ladenberger, 313 Ill. App. 1, 12; Ford Motor Co. vs. National Bond and Investment Co., 294 Ill. App. 585, 599.

Reversal is urged because plaintiffs were permitted to prove that, at various times after the injuries were received that defendant, to several persons, had said he was going to pay plaintiffs' medical, hospital and other expenses. We believe that such testimony was competent, as an admission against interest. Defendant's instruction 11 in detail advised the jury that such payments and promises of payments would not justify finding of guilt of the defendant unless wanton conduct, as charged in the complaint, had been proven by the greater weight of the evidence. It was competent evidence for the jury to weigh. Sullivan v. Heyer, 300 Ill. App. 599, 601; Bradenkamp v. Rouge, 143 Ill. App. 143 Ill. App. 492, 495; Monroe v. Chaldeck, 78 Ill. 429; Jasman v. Meany, 250 Mass. 576; 146 N. E. 257; An Automobile Suit, Anderson, P. 533,

Sec. 464 (citing cases).

Contention is made that the complaint did not sufficiently state a cause of action. We believe that it did adequately charge defendant with wanton and wilful misconduct causing plaintiff's injuries. As to admissions of evidence of complaints made by defendant's wife to him, in regard to his speed and driving through stop lights in cities on the trip and in Richmond, near the scene of the collision, we do not think that the trial court erred. Burke v. Mallory, 294 Ill. App. 442, 444.

Error is assigned for refusal to grant a new trial on the ground that the defendant, during the course of the trial, and during adjournment of Saturday until Monday, told one of the jurors that he, the defendant, had insurance. An affidavit of defendant was filed several weeks after the conclusion of the trial in support of motion for new trial. The affidavit stated that juror asked defendant if he had insurance and that defendant, being embarrassed and surprised and not knowing the full effect, stated that he had insurance and had been advised that because the evidence showed he had agreed to pay medical and hospital bills that his insurance would not protect him. Defendant's affidavit further stated that he did not disclose this conversation to his attorneys until a couple of weeks after the trial had closed and two days before argument for new trial.

No insurance company is a party to this proceedings; defendant is. No fraud or misconduct whatever on the part of plaintiffs appear. An adult defendant, competent to testify and stand trial, cannot so act, gamble on the outcome of a trial, and then use his own deliberate wrong to upset a lengthy court proceeding and deprive a plaintiff of his right to a judgment. No criticism can be attached to eminent counsel representing appellant. But they are his agents and are bound by his actions. It would be a travesty on justice to grant a new trial on such showing. The

1. The first part of the report deals with the general situation of the country and the progress of the work of the Commission. It is divided into two main sections: the first section deals with the general situation and the second section deals with the progress of the work of the Commission.

2. The second part of the report deals with the specific work of the Commission. It is divided into three main sections: the first section deals with the work of the Commission in the field of education, the second section deals with the work of the Commission in the field of science and technology, and the third section deals with the work of the Commission in the field of culture and sports.

3. The third part of the report deals with the conclusions and recommendations of the Commission. It is divided into two main sections: the first section deals with the conclusions and the second section deals with the recommendations.

4. The fourth part of the report deals with the annexes. It is divided into three main sections: the first section deals with the list of members of the Commission, the second section deals with the list of members of the working groups, and the third section deals with the list of members of the advisory committee.

5. The fifth part of the report deals with the bibliography. It is divided into two main sections: the first section deals with the books and the second section deals with the articles.

6. The sixth part of the report deals with the index. It is divided into two main sections: the first section deals with the names of the members of the Commission and the second section deals with the names of the members of the working groups.

7. The seventh part of the report deals with the list of abbreviations. It is divided into two main sections: the first section deals with the abbreviations of the names of the members of the Commission and the second section deals with the abbreviations of the names of the members of the working groups.

8. The eighth part of the report deals with the list of symbols. It is divided into two main sections: the first section deals with the symbols of the names of the members of the Commission and the second section deals with the symbols of the names of the members of the working groups.

9. The ninth part of the report deals with the list of tables. It is divided into two main sections: the first section deals with the tables of the names of the members of the Commission and the second section deals with the tables of the names of the members of the working groups.

10. The tenth part of the report deals with the list of figures. It is divided into two main sections: the first section deals with the figures of the names of the members of the Commission and the second section deals with the figures of the names of the members of the working groups.

11. The eleventh part of the report deals with the list of maps. It is divided into two main sections: the first section deals with the maps of the names of the members of the Commission and the second section deals with the maps of the names of the members of the working groups.

12. The twelfth part of the report deals with the list of photographs. It is divided into two main sections: the first section deals with the photographs of the names of the members of the Commission and the second section deals with the photographs of the names of the members of the working groups.

13. The thirteenth part of the report deals with the list of films. It is divided into two main sections: the first section deals with the films of the names of the members of the Commission and the second section deals with the films of the names of the members of the working groups.

14. The fourteenth part of the report deals with the list of sound recordings. It is divided into two main sections: the first section deals with the sound recordings of the names of the members of the Commission and the second section deals with the sound recordings of the names of the members of the working groups.

15. The fifteenth part of the report deals with the list of other materials. It is divided into two main sections: the first section deals with the other materials of the names of the members of the Commission and the second section deals with the other materials of the names of the members of the working groups.

Court did not err in refusing to grant a new trial on that ground.

As a further basis for reversal, defendant contends that the court erred in giving plaintiffs instructions numbers 3 and 4. Instruction number 3 quoted Section 12603 of the Ohio Statute, and pertained to the driving of a motor vehicle at a speed greater than is reasonable or proper, having regard to the traffic and which instruction concluded as follows: "No person shall drive any motor vehicle in and upon any public road or highway at a greater speed than will permit him to bring it to a stop with the assured cleared distance ahead." The objection is that this instruction is in the abstract and that the complaint did not charge the defendant with having driven his car at a greater speed than would permit him to stop in such assured cleared distance. We must bear in mind that instructions are to be considered as a series. The complaint averred that the above quoted statute was wantonly violated. Under the Ohio decisions, speed and violation of automobile statutory regulations are proper to be considered with other facts and circumstances in determining whether ones conduct is wanton and wilful. The charge in the complaint of wanton and wilful misconduct was broad enough to admit proof of the speed and the manner in which defendant drove his car as he approached the scene of the accident, whether it be prohibited by the statute in question or by common law. We do not believe that the jury was misled by this instruction, and the defendant is in no position to complain of it being abstract in form for at least two of his fall in that category.

Criticism is made to the plaintiff's given instruction Number 4 which refers to the complaint. It charges the jury that if the defendant was guilty as charged in the complaint of some acts or omissions or such reckless character as to show defendant had an utter disregard for the safety and lives of others riding in his automobile, that contributory negligence by them would be no

defense. A jury would clearly understand this instruction to mean that negligence was not a defense to wanton and wilful misconduct. Contrary to the claims of the defendant, this instruction in no way advised the jury that the defendant was guilty of wanton misconduct, nor did it pretend to define wanton and wilful misconduct. Defendants given instruction Number 5 at length recited what conduct must be proven to constitute wanton and wilful misconduct. Defendant by his given instructions Numbers 3 and 4 likewise referred to the complaint. He is in no position here to complain of the plaintiff in so doing. Lorette v. Davis, 225 Ill. App. 93, 99, Aff. 306 Ill. 346; Wennmacher v. Choate, 224 Ill. App. 42, 43-49.

Without burdening this opinion with a further discussion on the subject of instructions, suffice to say that the defendant was well favored by the trial court in instructing the jury. We find no error therein that would justify a reversal of this case

The judgments herein should be and they are hereby affirmed.

JUDGMENT AFFIRMED.

FILED

DEC 2 1912

David E. McKillop

CLERK OF THE COURT
JAN 1 1913

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42403

In the Matter of:
The Estate of JOHN A. MONAHAN, Deceased,
MARY A. MONAHAN, Administratrix,
Appellant,

v.

CHARLES W. WIGGINS,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

6358

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Mary A. Monahan, administratrix of the estate of her husband, John A. Monahan, who died November 23, 1940 filed her petition in the Probate Court to compel Charles W. Wiggins, who she alleged was the partner of her deceased husband, to file an inventory of the partnership estate as required by statute (Ill. State Bar Stat., 1941, Chap. 3, Sec. 188, par.340). A citation issued (Sec. 191). Wiggins answered denying there was any partnership. The Probate Court took the evidence, found there was a partnership and entered an order directing Wiggins to file the inventory. Wiggins appealed to the Circuit Court, where on trial de novo the court found there was no partnership and dismissed the petition with judgment for costs against the administratrix, and she appeals.

The sole question for determination is whether a partnership existed such as would obligate Wiggins to file the inventory.

The material facts established by the evidence appear to be that deceased and respondent were friends for many years. On September 27, 1935, they entered into a written lease with Irma Eismann, by which she demised to them for a period of ten years premises described as Lots 23 and 24 in J. E. White's Second Rutherford Park Addition in Chicago. The lands were vacant, 51 1/2 feet by 125 feet, and known as the northeast corner of Newcastle and

In the Matter of:
The Estate of JOHN A. MONAHAN, deceased,
MARY A. MONAHAN, Administratrix,
Appellant,

v.

CHARLES W. WIGGINS,
Appellee.

CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE KEENE presiding in the Court.

Mary A. Monahan, administratrix of the estate of her husband,

John A. Monahan, who died November 23, 1940 filed her petition in

the Probate Court to compel Charles W. Wiggins, who she alleged

was the partner of her deceased husband, to file an inventory of the

partnership estate as required by statute (Ill. State Bar Stat., 1941,

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Rutherford Park Addition in Chicago. The lands were vacant, 51 1/2

feet by 125 feet, and known as the northeast corner of Newcastle and

2.

North Avenues. The lease by its terms was to begin on December 1, 1935, and end November 30, 1945. It states: "with the option to lessees to enter upon the premises and construct a building immediately upon the signing of the lease, * * *." It also provides that the lessees shall erect a building on the premises and deposit in escrow with the Prairie State Bank for that purpose the sum of \$3500.00, and that at the termination of the lease the building and all improvements shall become a part of the real estate, and "that the parties of the second part shall have the option, during the term of the lease, to purchase the property for \$12,000.00." The lease also contains a clause authorizing confession of judgment against the lessees for unpaid rent.

The evidence shows Wiggins paid all the money necessary to construct this building and the place was opened for business January 1, 1936. The business conducted was a saloon or tavern. The building stands close to the line between the City of Chicago and the Village of Oak Park. Monahan was well acquainted in that vicinity and had many friends in it. The evidence indicates that with Wiggins he visited St. Charles, Illinois, where they inspected a building used as a tavern and decided to construct one similar in design.

With the opening of the tavern, Monahan became the bartender and continued to perform the duties of this position until his death from a sudden heart attack. Monahan had been in the candy business and continued to hold some of his customers. The evidence shows he was in the tavern every night from 6:00 P. M. until closing. Wiggins tried to work at the business for awhile, but, as he puts it, was sick "and had to lay up". Monahan would take the receipts at night when he closed up and leave the money in a box for Wiggins. Wiggins says that when the lease was signed he asked Monahan how about erecting the building, and Monahan said he thought he could get some money. After some time Wiggins said to him, "I will start the building and in the meantime you go along and see what you can do." Wiggins went ahead with money he had and other money he borrowed at the Prairie State Bank. He paid the contractors and took waivers of liens from them

North Avenue. The lease of the premises was for a term of years, to wit, from January 1,

1935, and ending November 30, 1938. It stated: "With this agreement to

leasees to enter upon the premises and construct a building

immediately upon the signing of this lease, and it is also pro-

vided that the leasees shall erect a building on the premises and

deposit in escrow with the Prairie State Bank for the purpose of

sum of \$300.00, and that at the termination of the lease and building

and all improvements shall become a part of the real estate, and that

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a tavern and decided to construct one similar in design.

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continued to perform the duties of this position until his death from

a sudden heart attack. Monahan had been in the candy business and

continued to hold some of his customers. The evidence shows he was in

the tavern every night from 8:00 P. M. until closing. Wiggins stated

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with money he had and other money he borrowed at the Prairie State

Bank. He paid the contractors and to the drivers of lime from them

3.

running to him. Monahan did not at any time pay any money and did not have it to pay. After some further time, Wiggins says, he asked Monahan what he was going to do. Monahan replied, "well, you have to have some help here and I won't be doing anything. I have been working only two nights a week tending bar, I will work for you with the understanding that you put my name upon the place and let it run as if we were partn rs." Wiggins continues, "I made an agreementb with Mr. Monahan that his wages would be \$25 a week. Mr. Monahan worked nights and the ordering was usually done in the day time by me, or whoever was on days." The city, state, government and cigarette licenses were all taken in the name of Wiggins. The bar fixtures were bought in the name of and paid for by Wiggins. A picture of the building is in the record. It shows the sign on it was "Wiggins and Monahan". The telephone also stood in the name of "Wiggins and Monahan". It is apparent Monahan was in charge of the business most of the time.

Mr. Muir, who worked at the place as a sort of handyman, says he was hired by Monahan and without ever talking with Wiggins. Some of the bills, he says, were made out to "Wiggins and Monahan". Helen Russell, a sister of Mrs. Monahan, who worked there as a waitress, gives similar testimony.

Mrs. Monahan testified that after her husband's death she had a talk with Wiggins about the business. She had a son, who she thought she could have "take over his father's end of the business". Mr. Wiggins said, "Why, you haven't any part of that business". She said, "Don't tell me John wasn't a partner there", and Mr. Wiggins said, "After everything is paid for he is going to be an equal partner," and he said, "his name wasn't shown on the license". Mrs. Monahan said, "Why wasn't it? I heard John say it was", Mr. Wiggins stated, "If he wanted his name on it why didn't he insist?"

The question of whether a partnership exists is in the first instance a question of the intention of the parties. The statute (Ill. State Bar Stat., 1941, Sec. 6, Part II, p. 2381) defines a

(11) State Bar Assoc., 1941, Sec. 6, Part 11, p. 1331. This is a question of whether a partnership exists in the first instance a question of the intention of the parties. The parties wanted his name as it was in the first place.

"Why wasn't it? I heard John say it was," Mr. Wiggins stated. "It was his name wasn't shown on the license." - yes, of course said, "After everything is paid for he is going to be an equal partner," and "Don't tell me John wasn't a partner there," and Mr. Wiggins said, "Wiggins said, 'Why, you haven't any part of that business.' The wife and the could have 'take over his father's end of the business.' Mr. a talk with Wiggins about the business. He had a son, who she thought Mrs. Wiggins told that after her husband's death she had gives similar testimony.

Russell, a sister of Mrs. Wiggins, who lived in the same house, of the bills, he says, were made out to "Wiggins and Wiggins." Helen he was hired by Wiggins and without ever talking with Wiggins. Some Mr. Muir, who worked at the place as a sort of handyman, says It is apparent Wiggins was in charge of the business most of the time. Wiggins". The telephone also stood in the name of "Wiggins and Wiggins". Building is in the record. It shows the sign on it was "Wiggins and bought in the name of and paid for by Wiggins. A picture of the license were all taken in the name of Wiggins. The bar licenses were or whoever was on duty." The city, state, government and cigarette worked nights and the morning was usually done in the day time by me, with Mr. Wiggins that his wages would be paid a week. Mr. Wiggins as if we were partners." Wiggins continued, "I was in the country the understanding that you put my name up on the license and let it run working only two nights a week tenting bar, I will work it up with have some help here and I won't be a big any more. I have to Wiggins what he was going to do. Wiggins replied, "Well, you have to have it to pay. After some further time, Wiggins said, "I was wanted to him. Wiggins did not think time day my money and did not

partnership as "an association of two or more persons to carry on as co-owners a business for profit". That there was such an intention to form a partnership here is established by the evidence. It is also clear the original intention was not carried out fully as originally planned. There was, however, no final settlement made of the joint operation of the business at any time. The legal title to the leasehold was at the time of Monahan's death in Wiggins and Monahan. The option to purchase runs to both of them. What the rights of the respective partners may be on an accounting is quite another question. We hold the administratrix is entitled to have the property owned jointly inventoried.

The judgment will therefore be reversed and the cause remanded to the Circuit Court with directions to enter an order dismissing the appeal of Wiggins from the order of the Probate Court of Cook County.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

partnership as "an association of persons for the purpose of carrying on a business for profit". It is not necessary to have a partnership here is established by the evidence. It is also clear the original intention was not to have it as originally planned. There was, however, a joint operation of the business of the partnership at the time of formation. The partnership was at the time of formation a partnership and not a partnership. The option to purchase was to both of them. The right of the respective partners may be on an accounting is due to each partner. We hold the administrative is entitled to have the property owned jointly inventoried.

The judgment will therefore be reversed and the case remanded to the Circuit Court with directions to set aside the judgment and appeal of Williams from the order of the Probate Court of Cook County. REV. JUDGE AND JUDGE OF THE CIRCUIT COURT.

O'Connor and McGuire, JJ., concur.

42416

MICHAEL TALLITSCH,
Plaintiff
and
A. C. WILCOX, Assignee of Plaintiff,
Appellants,
v.
JOSEPH ESTERLE and ELIZABETH ESTERLE,
Appellees.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

310 1A. 2481

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal, the notice states, is from an order of the court entered June 5, 1942, vacating a judgment for plaintiff entered August 28, 1941. Reversal is asked with directions to the court below to reinstate the judgment for plaintiff as entered on August 28, 1941.

There is no report of proceedings in the record. It appears on July 10, 1941, an action was brought by Tallitsch against the Esterles. Summons issued returnable July 24, 1941. The statement of claim showed a balance said to be due on account of wages for \$1,052.40. August 14, 1941, on motion of defendants, plaintiff was ordered to file a bill of particulars in five days, and the time for defendants to file an affidavit of merits was extended until five days thereafter. The bill of particulars was filed on August 18, 1941. On August 28, 1941 an order of default was entered against the defendants for want of an affidavit of merits and on affidavit of plaintiff's claim, the court finding that there was due to plaintiff the sum of \$1,052.40, entered judgment for that amount.

August 29, 1941, the defendants filed an affidavit of merits denying that they were indebted to plaintiff in any amount. January 7, 1942, a writ of execution issued to the bailiff of the Municipal

MICHAEL TALLITSON, Plaintiff

and

A. C. WILCOX, Assignee of Plaintiff,

Appellants,

v.

JOSEPH ESTERLE and ELIZABETH ESTERLE,

Appellees.

MR. PRESIDING JUSTICE MALCHUK DELIVERED THE FOLLOWING OPINION.

This appeal, the notice states, is from an order of the court

entered June 5, 1942, vacating a judgment for plaintiff entered

August 28, 1941. Reversal is asked with directions to the court below

to reinstate the judgment for plaintiff as entered on August 28, 1941.

There is no report of proceedings in the record. It appears

on July 10, 1941, an action was brought by Tallitson against the

Esterles. Summons issued returnable July 24, 1941. The statement of

claim showed a balance said to be due on account of wages for \$1,082.40.

August 14, 1941, on motion of defendants, plaintiff was ordered to

file a bill of particulars in five days, and the time for defendants to

file an affidavit of merits was extended until five days thereafter.

The bill of particulars was filed on August 18, 1941. On August 28,

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of an affidavit of merits and on affidavit of plaintiff's claim, the

court finding that there was due to plaintiff the sum of \$1,082.40,

entered judgment for that amount.

August 28, 1941, the defendants filed an affidavit of merits

denying that they were indebted to plaintiff in any amount, to-wit:

7, 1942, a writ of execution issued to the sheriff of the Municipal

2.

Court. Demand was made by the bailiff January 14, 1942, and April 7, 1942, the writ was returned unsatisfied. May 19, 1942, an alleged assignment of the judgment by plaintiff to A. C. Wilcox was filed, and May 29, 1942, defendants filed a petition to vacate the judgment. The petition set up that on the date the judgment was entered and defendants defaulted an amended affidavit of merits was filed by them, as would appear from an order of court entered on that day. The petition averred defendants were not indebted to plaintiff in any sum and that as a matter of fact, the cause had been dismissed January 15, 1942, having been satisfactorily adjusted between the parties; that as a matter of fact, on that date defendants adjusted their differences with Tallitsch, paid him the sum of \$20.00 to cover court costs expended by him, and said sum was received by him in full satisfaction of all claims; that thereupon Tallitsch executed a letter in duplicate, copy of which is attached to the petition, promised to deliver the original letter to the attorney for the plaintiff and to have the cause dismissed. The letter is addressed to the attorney for plaintiff and is signed by plaintiff. It states: "I was today advised that a judgment was entered in the above matter on August 28, 1941, in the sum of \$1052.40 and costs. You will kindly vacate said judgment immediately and dismiss this case. Very truly yours,".

On June 3, 1942, an order was entered by the court giving plaintiff leave to file an answer instantner to the petition, and "by agreement between the parties hereto, it is ordered that a trial by jury in this cause be waived, * * *." The order further states that the judgment is to be opened, leave given defendants to appear and make defense, and that a trial of the cause be had, the judgment to stand as security, the petition and defense to stand as an affidavit of defense, and that execution should be stayed until the further order of the court.

Answer was filed on June 3. It set up as defense to the petition want of diligence on the part of defendants: said that the time-clock

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defendants filed a petition to vacate the judgment. The petition set
of the judgment by plaintiff to A. C. Wilcox was filed, and May 29, 1942,
the writ was returned unexecuted. May 19, 1944, an amended judgment
Court. Demand was made by the plaintiff January 14, 1942, and April 17, 1942.

3.

stamp on the amended affidavit of defense indicated the document was filed on August 29, 1941, at 11:15 A. M., at least twenty-four hours after the entry of the judgment; that the filing was, therefore, unauthorized, and the document should be stricken. It says that defendants have no defense to plaintiff's claim, and that plaintiff's letter, copy of which is attached to defendants' petition, was executed under threats of causing plaintiff to lose his union card, and was also obtained without the benefit of advice of counsel; that defendants have no reason to believe the claim is satisfactorily adjusted; that they have failed to carry out their part of the proposed agreement, namely, the paying of the court costs and attorney's fees, and that they have not paid any part of the attorney's fees to date; that no consideration had been paid by defendants to plaintiff for the settlement of the judgment, and that the acceptance by plaintiff of \$20.00 on account of costs does not amount to a discharge of defendants' debt and judgment. The answer also set up that after defendants repudiated the supposed settlement the plaintiff assigned the judgment, and the assignment has been duly filed.

June 5, 1942, the order of June 3, 1942, was vacated and the default in judgment of August 28, 1941, was also vacated and set aside. This is the order appealed from.

The plaintiff assignee contends that as nine months had elapsed after the entry of the judgment of August 28, 1941, the court no longer had jurisdiction to vacate and set/^{it} aside. The law is that ordinarily after the elapse of thirty days from the date on which it is entered, a judgment of the Municipal court becomes final and the court without jurisdiction to vacate it. Of the many cases which so hold it will be sufficient to cite Travelers Ins. Co. v. Wagner, 279 Ill. App. 13. However, in such case a party is not left wholly without a remedy and by petition under Section 21 of the Municipal court Act may upon proper showing have the judgment set aside. Imbrie v. Bear, 230 Ill. App. 155, 157. There is no claim here, however, the proceeding was either under

stamp on the amended affidavit of defense indicated the document was filed on August 20, 1941, at 11:15 A.M., at least twenty-four hours after the entry of the judgment; that the filing was, therefore, unauthorized, and the document should be stricken. It says that defendants have no defense to plaintiff's claim, and that plaintiff's letter, copy of which is attached to defendants' petition, was executed under threats of causing plaintiff to lose his union card, and was also obtained without the benefit of advice of counsel; that defendants have no reason to believe the claim is satisfactorily adjusted; that they have failed to carry out their part of the proposed agreement, namely, the paying of the court costs and attorney's fees, and that they have not paid any part of the attorney's fees to date; that no consideration had been paid by defendants to plaintiff for the settlement of the judgment, and that the acceptance by plaintiff of \$50.00 on account of costs does not amount to a discharge of defendants' debt and judgment. The answer also set up that after defendants repudiated the supposed settlement the plaintiff assigned the judgment, and the assignment has been duly filed.

June 3, 1942, the order of June 3, 1942, was vacated and the default in judgment of August 20, 1941, was also vacated and set aside. This is the order appealed from.

The plaintiff assigned contends that as nine months had elapsed after the entry of the judgment of August 20, 1941, the court no longer had jurisdiction to vacate and set aside. The law is that ordinarily after the elapse of thirty days from the date on which it is entered, judgment of the municipal court becomes final and the court without jurisdiction to vacate it. Of the many cases which so hold it will be sufficient to cite Travelers Ins. Co. v. Western, 239 Ill. App. 13. However, in such case a party is not left wholly without a remedy and by petition under Section 21 of the municipal court Act may upon proper showing have the judgment set aside. Impris v. Healy, 230 Ill. App. 125, 127. There is no claim here, however, the proceeding was either under

4.

that section or under Section 72 of the Civil Practice Act, in either of which cases the order setting aside the judgment would be final in its nature and reviewable. Cramer v. Commercial Men's Ass'n., 206 Ill. 516. This order is distinguishable in the fact that as it states it is entered "by agreement between the parties hereto". Parties may give the court jurisdiction by appearing after the expiration of the term at which the judgment is entered, or after 30 days have expired, as provided by statute, and that is the situation here. The order is not itself final in its nature. It merely directs a trial of the cause shall be had, the judgment stand as security, the petition to stand as an affidavit of defense and execution be stayed.

We hold the cause is still pending in the Municipal Court. There is no reason why either of the parties may not have the matter set down for hearing under the rules of that court. The parties, by agreement having given the court jurisdiction, and the order entered and appealed from being interlocutory in its nature, the appeal will be dismissed.

APPEAL DISMISSED.

O'Connor and McSurely, JJ., concur.

that section or under Section 72 of the Civil Practice Act, in either of which cases the order setting aside the judgment would be final in its nature and reversible. Graham v. Commonwealth, 208 Ill. 516. This order is distinguishable in the fact that it states it is entered "by agreement between the parties hereto". Parties may give the court jurisdiction by appearing after the expiration of the term at which the judgment is entered, or after 30 days have expired, as provided by statute, and that is the situation here. The order is not itself final in its nature. It merely directs a trial of the cause shall be had, the judgment stand as accuracy, the decision to stand as an affidavit of defense and execution be stayed.

We hold the cause is still pending in the judicial court. There is no reason why either of the parties may not have the matter set down for hearing under the rules of that court. The parties, by agreement having given the court jurisdiction, and the order entered and appealed from being entirely in its nature, the appeal will be dismissed.

ALL HONORABLE

O'Connor and McGinnis, JJ., concur.

42435

MAE L. RIORDAN,

Appellant,

v.

ARTHUR T. McINTOSH,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

318 I.A. 248²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On March 6, 1942, plaintiff filed her amended statement of claim which in substance averred that defendant, an owner and dealer in real estate, through the use of false and fraudulent representations known by him to be false when made, and intending to deceive and defraud plaintiff, procured from her the execution of a written contract wherein she and her husband as joint tenants agreed to purchase a parcel of real estate described in the contract and to pay for it the sum of \$2500.00 with interest. The claim avers plaintiff paid the total sum of \$2,920.87, which she now seeks to recover with interest. A copy of the contract is attached to the statement of claim. It was executed December 1, 1924. On October 22, 1934, plaintiff's son Clifford executed a rider, making some modifications in the contract. On November 25, 1941, the claim avers plaintiff discovered the representations made and upon which she relied were false. In January, 1942, she filed this suit. The husband is not joined as co-plaintiff.

The land purchased was in Cook County and 150 feet 9 inches of it fronted on what is described as Cicero Avenue. There was a frontage of 283 feet 7 inches on what was known as 143rd Street. The statement of claim says that in making the sale defendant used a plat which indicated that 143rd Street was a public highway. This statement also says that the sales agent who procured the contract falsely represented to plaintiff this was a fact. Because this fact as represented was false the lot was worth not more than \$400.00.

March 11, 1942, defendant made a motion to strike the amended

ARTHUR T. SINT...
 Defendant,
 v.
 MRS. L. ALBION...

MR. PRESIDING JUDGE... 1942

On March 6, 1942, Plaintiff filed her amended petition in which in substance averred that defendant, on or about March 11, 1942, through the use of false and fraudulent representations known by him to be false when made, and intending to deceive and defraud Plaintiff, procured from her the execution of a deed in which she and her husband as joint tenants agreed to purchase a certain real estate described in the contract and to pay for it the sum of \$2500.00 with interest. The claim avers by Plaintiff in the first part of \$2,920.87, which she now seeks to recover with interest. The contract is attached to the statement of claim. It was executed December 1, 1941. On October 22, 1942, Plaintiff's motion for summary judgment was granted, making some modifications in the contract. On November 25, 1941, the claim avers Plaintiff discovered the representations made and upon which she relied were false. In January, 1942, she filed this suit. The husband is not joined as co-defendant. The land purchased was in Cook County and 150 feet in width of it fronted on what is described as 610 1/2 Avenue. There was a frontage of 283 feet 7 inches on what was known as 11th Street. The statement of claim says that in making the sale certain representations which indicated that 11th Street was a public highway. This statement also says that the sales agent who procured the contract was represented to Plaintiff this was a fact. Because this fact as represented was false the lot was worth not more than \$400.00. March 11, 1942, defendant made a motion to strike the amended

2.

statement of claim and dismiss the suit. Ill. State Bar Stats. 1941, Chap. 110, §48, Par. 172, p.2423. The reasons, as alleged, were that the claim as made did not state a cause of action; that the representations were of such a nature that plaintiff had no right to rely thereon; that there was a non-joinder of necessary parties plaintiff; that for want of necessary parties to the cause the court cannot adjudicate the rights of all persons who appear to have an interest in the contract; and finally, because it affirmatively appears from the amended statement of claim that the supposed cause of action of plaintiff did not accrue to the plaintiff at any time within five years next before the commencement of the suit, in other words, that the claim upon its face is barred by the Statute of Limitations, Ill. State Bar Stats. 1941, Chap. 83, §15, p. 1997.

We assume the statement of claim sets up a good cause of action, although there is some doubt whether the alleged fraudulent representations were of a kind on which plaintiff had any right to rely. These representations were to the effect that 143rd Street was a public highway. The statement avers this was untrue, and through reliance thereon she was defrauded. The truth, however, as to these representations was at all times available to plaintiff. There are cases which seem to hold that a plaintiff has no right to rely and cannot base a suit to rescind and recover money paid because of such representations. Day v. Fort Scott Investment Co., 153 Ill. 293; Bundesen v. Lewis, 368 Ill. 623.

The motion to dismiss was based on Section 48 of the Civil Practice Act (Smith-Hurd Ill. Anno. Stat., Chap. 110, par.172, pp.390-391) and the defendant raised the question, (he had a right to do so under the statute) that the cause of action had not accrued within the time limited by law for the commencement of an action or suit thereon. That contention, we hold, must be sustained. Plaintiff seems to have proceeded on the theory that the Statute of Limitations would not begin to run until she discovered the fraud which had been perpetrated upon her and cites Regan v. Grady, 243 Ill. 423-429. That suit, however, was brought in equity and not in law as here. The question there concern-

3.

ed the equitable doctrine of laches not the Statute of Limitations as applied to a suit at law. The facts alleged in the statement of claim do not tend to establish any affirmative concealment of the cause of action such as to remove the bar of the statute. We hold, therefore, the cause of action stated in the claim is barred by the five-year Statute of Limitations (section 15) and that the court did not err in striking the statement and dismissing the suit. Keithley v. Mutual Life Ins. Co. of New York, 271 Ill. 584; Jackson v. Anderson, 355 Ill. 550; Dusek v. Britigan, 309 Ill. App.130; Milwaukee Commercial Bank v. Bennett, et al., 249 Ill. App. 456; Skroadzki v. Sherman State Bank, 261 Ill. App. 16.

The judgment will be affirmed.

AFFIRMED.

McSurely, J., concurs.
O'Connor, J., concurs in the result.

42443

PHILIP HANO COMPANY, INC.,
Appellee,

v.

CENTRAL METALLIC GASKET COMPANY, INC.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

361

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT

319 I.A. 249

Plaintiff sued on March 12, 1942, to recover the sales price of goods and merchandise manufactured at defendant's request and delivered to defendant and by it rejected. The claim is for the agreed price of \$962.37. Invoices for the goods were attached to the statement of claim.

Defendant denied that an order to manufacture was given, as alleged, or that the contract was completed, or that the sum claimed was due. The answer, however, admitted that on May 29, 1941, through W. R. Peterson defendant placed an order for certain printed forms to be used for bill purposes, and alleged defendant did not know plaintiff was doing the work until proofs were submitted, which defendant inspected and approved; that Peterson agreed to do the work within 30 days from the date of the order; that a partial delivery was made on September 10, 1941, which, however, was not in conformity with the order; that defendant could not use these forms and returned the same to Peterson. The answer said on September 23, 1941, another shipment was delivered to the defendant by plaintiff, inspected and refused as defective and not in accordance with the terms of the contract; that certain sets were missing and that defendant could not use any of the forms; that it was over four months before any of the forms were delivered by plaintiff, and that in the meantime defendant was forced to place an order elsewhere; that the particular goods

PHILIP L. ...

v.

GENERAL ...

MR. PHILIP L. ...

Plaintiff sued on ...
of goods and merchandise manufactured and delivered to defendant ...
agreed price of \$32.37. ...
the statement of claim.

Defendant denied that he owed to plaintiff ...
alleged, on that the contract was completed, ...
was due. The answer, however, stated that ...
... person defendant at ...
to be used for bill ...
plaintiff as doing the ...
defendant intended ...
work within 60 days from the ...
was made on ...
with the order; ...
the same to ...
shipment was delivered to the defendant by ...
refused as defective and ...
contact; that certain ...
use any of the forms; that it was ...
forms were delivered by plaintiff, ...
was forced to place an order ...

ordered were of a technical nature and were made to fit in a machine; that specific orders were given to Peterson at the time the order was given, and that defendant is not liable to plaintiff for the amount claimed or any other sum.

There was a trial by the court with a finding against defendant in favor of plaintiff for \$962.37, with judgment, from which the defendant appeals.

At the trial, after a preliminary conversation in which plaintiff insisted that under the pleadings the defense was an affirmative one and that defendant should therefore be required to proceed with his case, the court so ruled and directed the defendant to proceed. Defendant contends the ruling was erroneous and cites a number of cases, such as Chicago Union Traction Co. v. Mee, 218 Ill. 9; Winter v. Dibble, 251 Ill. 200, and Turner v. Turner, 164 Ill. App.1. There is no doubt of the general rule of law that the burden of proof is upon a plaintiff to establish the material averments of his complaint by a preponderance of the evidence. That rule, however, is not violated necessarily in a trial before the court by the particular order in time in which the proofs are submitted. It was unnecessary to prove things admitted by the pleadings and under the pleadings here we think the court did not commit reversible error in holding that defendant's defense was an affirmative one. The order for the goods, the shipment to defendant, the rejection thereof by defendant were all admitted by the answer. The court did not err in this respect.

Defendant insists there was no proof that plaintiff in fact delivered the goods ordered. The contract provided that the forms were to be F. O. B. Holyoke, Massachusetts, where the business of plaintiff was located, and that the delivery to the carrier there should constitute delivery and transfer title and possession to the defendant. The proof shows without question that the goods arrived in Chicago and were rejected by defendant. Section 46 of the Uniform Sales Act (Jones Ill. Stats. Anno., Sec. 121.50) provides:

III. State, Area, Year, Dec. 191. (30) 1911:

3.

"Where, in pursuance of a contract to sell or a sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in Section 19, Rule 5, or unless a contrary intent appears."

Rule 5, Section 19, (Jones Ill. Stat. Anno., Sec. 121.23) provides in substance that if the contract to sell requires the seller to deliver the goods to the buyer, or at a particular place, or to pay the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place agreed upon. It is apparent that the exception stated in Rule 5 is not applicable to the facts of this case. The evidence was sufficient to show that the goods were, under all circumstances, delivered within a reasonable time. At any rate, we cannot hold that the finding of the court on this point was against the manifest weight of the evidence. The court held there was a substantial compliance with the contract, and the opportunity of the court to see and hear the witnesses gave advantages in this respect which this court does not possess.

It is contended by defendant that in suing for the price of the articles retained by it, plaintiff has adopted the wrong measure of damages. Uniform Sales Act, Part 5, §64 (4), 1941, Ill. State Bar State., p. 2816, and Corn Plaster Refining Co. v. G. R. Jenkins & Co., 217 Ill. App. 139, are cited. The section is inapplicable. Section 63 (1) of the Uniform Sales Act provides:

"Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

We hold this section applicable and that plaintiff could properly proceed thereunder. Moreover, the undisputed evidence shows that the character of the goods was such that they could not be resold.

"Where, in pursuance of a contract to sell, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is deemed to be a delivery of the goods to the buyer, except in the cases provided for in Section 13, Rule 5, in which a contrary intent appears."

Rule 5, Section 13, Uniform Sales Act, sec. 13, 13-1.

provides in substance that if the contract is to deliver the goods to the buyer, or to a person named by the buyer, the freight or cost of transportation to the buyer, or to a particular place, the property does not pass until the goods have been delivered to the buyer or reached the place named. It is apparent that the exception stated in Rule 5 is not applicable to the facts of this case. The evidence was sufficient to show that the goods were, under all circumstances, delivered within a reasonable time. At any rate, we cannot hold that the finding of the court or the verdict against the manifest weight of the evidence. The court will not set aside a substantial compliance with the contract, and the responsibility of the court to see and hear the witnesses gave advantage to the party which this court does not possess.

It is contended by defendant that in selling the goods to the articles retained by it, plaintiff has adopted the wrong measure of damages. Uniform Sales Act, Part 5, sec. 1304, 13-1. State law states, p. 2816, and Corn Elevator v. State, 13-1, 217 Ill. App. 139, are cited. The section is applicable to the facts of the case. The Uniform Sales Act provides:

"Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the bill, the seller may maintain a action against the buyer for the price of the goods."

We hold this section applicable and the claim for goods properly proved thereunder. Moreover, the undisputed evidence shows that the character of the goods was such that they could not be resold.

4.

If paragraph 1 of Section 63 were not applicable, then under paragraph 3 of this section (Jones Ill. Stats. Anno., Sec. 121.67) plaintiff would be entitled to treat the goods as the buyers and maintain an action for the purchase price.

The judgment of the trial court will be affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

It paragraph 1 of section 68 were not abolished, then under paragraph 1

3 of this section (Jones III, State, Anne, Inc. 1981) (1981)

would be entitled to treat the goods as the buyers and maintain an

action for the purchase price,

The judgment of the trial court will be affirmed.

1. *Albino*

[illegible]

42471

RUTH E. MARSH, Administratrix, Estate of
John W. Marsh, Deceased,

and

BLANCHE GEHRKE, Administratrix, Estate of
William Gehrke, Deceased,

Appellants,

v.

HAZEL O'FLAHERTY and PAUL RITTIS,

Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

319 I.A. 250

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

These two suits grew out of an occurrence which took place in Cook County northwest of Chicago at the intersection of Milwaukee Avenue and Golf Road on June 16, 1938. An automobile driven east on Golf Road collided with a truck going north on Milwaukee Avenue. As a result of the collision John W. Marsh and William Gehrke received injuries from which they died. The administratrices are respectively the wives of the decedents and sued defendants under the statute permitting recovery for wrongful death. Each suit was brought against Hazel O'Flaherty and Paul Rittis defendants. Frank O'Flaherty was also named defendant but the suits were dismissed as to him. In each suit Hazel O'Flaherty and Paul Rittis filed an answer denying liability and also a counterclaim. The suits were consolidated for hearing and the respective causes tried by the same jury. In each case the jury returned a verdict of guilty as to Paul Rittis and in favor of both the administratrices, with damages assessed at \$10,000. The verdict as to Hazel O'Flaherty was not guilty, and as to the counterclaim the jury returned a verdict of not guilty as to each defendant administratrix. Plaintiffs made motions for a new trial as

JOHN W. LARSEN, Defendant,
 v.
 JOHN W. LARSEN, Plaintiff.

and

WILLIAM LARSEN, Defendant,
 v.
 WILLIAM LARSEN, Plaintiff.

v.

HAROLD LARSEN and
 LARSEN, Plaintiff.

MR. JUDICIAL CLERK

These two suits grew out of an automobile accident which took place on

Cook County Northwest of Chicago at the intersection of 111th

Avenue and Golf Road on June 16, 1938. An automobile driven east on
 Golf Road collided with a truck traveling north on 111th Avenue. As a

result of the collision John W. Larsen and William Larsen sustained

injuries from which they died. The estates of John W. Larsen and

the wives of the deceaseds and Paul Little and under the estate

permitting recovery for wrongful death. The estates of John W. Larsen and

Hazel O'Flaherty and Paul Little before the court. The estates of

also named defendant but the suits were dismissed as to him. Each

suit Hazel O'Flaherty and Paul Little filed a claim for damages

liability and also a counterclaim. The suits were consolidated for

hearing and the respective causes tried by the jury. In each

case the jury returned a verdict of guilty as to Paul Little and in

favor of both the administratrixes, with damages assessed at \$10,000.

The verdict as to Hazel O'Flaherty was not guilty, and as to Paul

counterclaim the jury returned a verdict of not guilty as to each

defendant administratrix. Plaintiff made no claim for damages as to

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to Hazel O'Flaherty, which were denied, and judgments were entered on the verdicts. The appeals are by plaintiffs from the judgments in favor of Hazel O'Flaherty and have been consolidated in this court.

It is contended for reversal that the court erred in permitting Mrs. O'Flaherty to testify in her own behalf because she was disqualified under the statute (Ill. Rev. Stat. 1942, Chap. 51, §2) and also for the reason that the verdict in her favor is clearly and manifestly against the evidence. We hold both contentions in both cases must be sustained. Bailey v. Robinson, 244 Ill. 16 by the Supreme Court and in Sullivan v. Corn Products Refining Co., 245 Ill. 9, affirming 147 Ill. App. 227, and by this court in DeMay v. Brew, 306 Ill. App. 505; Blachek v. City Ice & Fuel Co., 311 Ill. App. 22, and numerous other cases, which are conclusive. Rittis was not called as a witness. The court first questioned Mrs. O'Flaherty in chambers and out of the hearing of the jury. He decided to have her testify. Plaintiff's attorney objected. The objection was overruled.

Mrs. O'Flaherty's evidence in substance was that she lived with her husband Frank in Elgin, Illinois, that he owned the auto (a Ford); that on the day in question she, at 1 o'clock drove him in it to his place of work, then went home, then drove the auto down town to shop. There she met Rittis and talked with him for a time. He wanted to go to a place to bet on a horse. She and he left at 3 o'clock. Rittis drove; she occupied the right front seat beside him. He did not tell her how far or to what place. She noticed he was driving "all right" and rested her head on the back of the front seat. She says he made a full stop at Milwaukee Avenue. She saw the truck and sat up in her seat. There was a crash. She saw the truck down the road quite a way. She did not at any time tell Mr. Rittis how to operate the automobile. She says the truck struck the auto. She also says that Rittis had several times before this driven the auto while she

to Hazel O'Flaherty, which were denied, and judgments were entered on the verdicts. The appeals are by plaintiff from the judgments in favor of Hazel O'Flaherty and have been consolidated in this court. It is contended for reversal that the court erred in permitting Mrs. O'Flaherty to testify in her own behalf because she was disqualified under the statute (Ill. Rev. Stat. 1902, Chap. 51, § 2) and also for the reason that the verdict in her favor is clearly and manifestly against the evidence. We hold both contentions in each case must be sustained. Bellet v. Robinson, 244 Ill. 10 by the Supreme Court and in Enright v. Gory Products Mfg. Co., 245 Ill. 9, affirming 147 Ill. App. 385, and by this court in Gray v. Gray, 308 Ill. App. 508; Black v. City Ice & Fuel Co., 311 Ill. App. 247, and numerous other cases, which are conclusive. Little was not called as a witness. The court first questioned Mrs. O'Flaherty in chambers and out of the hearing of the jury. He decided to have her testify. Plaintiff's attorney objected. The objection was overruled. Mrs. O'Flaherty's evidence in substance was that she lived with her husband Frank in Elgin, Illinois, that he owned the auto (a Ford); that on the day in question she, at 1 o'clock drove him in to his place of work, then went home, then drove the auto down town to shop. There she met Little and talked with him for a time. He wanted to go to a place to bet on a horse. She and he left at 3 o'clock. Little drove; she occupied the right front seat beside him. He did not tell her how far or to what place. She noticed he was driving "all right" and rested her head on the back of the front seat. The auto made a full stop at Milwaukee Avenue. She saw the truck and got up in her seat. There was a crash. She saw the truck down the road quite a way. She did not at any time tell Mr. Little how to operate the automobile. She says the truck struck the auto. She also says that Little had several times before this driven the auto while she

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and her husband were riding in it.

The brief of Mrs. O'Flaherty, while admitting the admission of her evidence was error, says it was not necessarily reversible, and that the judgment in her favor should be affirmed. We cannot so regard it. We hold it was reversible error to receive her evidence over objection.

We are also of the opinion the verdict is against the weight of the evidence. The accident (as already stated) occurred at about 3:00 P. M. at the intersection of Milwaukee Avenue and Golf Road. Milwaukee Avenue runs in a southeasterly and northwesterly direction and intersects Golf Road, which runs east and west. Both roads are four lane roads, paved with concrete. The occurrence witnesses (if we exclude the testimony of Mrs. O'Flaherty) practically agree that the truck was going northwest on Milwaukee Avenue at a speed of about fifteen miles per hour, while the auto was coming east on Golf Road at a speed of fifty or more miles per hour; that the truck was first in the intersection and had the right-of-way; that the auto (a Ford) nevertheless proceeded across the intersection without diminishing its speed, disregarding signs which warned it to "stop" and "slow down", passed an auto just ahead of it, and when in the middle of the intersection struck the cab of the truck with such force as to turn it over and demolish both vehicles. The evidence indicates that if Mrs. O'Flaherty was not driving, she was nevertheless by authority of her husband in control of the machine. On any theory, she chose the driver Rittis and was by his side when he drove. Empty bottles were found in the car after the collision. She denied this. If it were not true, the car was certainly driven with recklessness tending to corroborate this testimony. The law applicable is quite clear. Can one charged with the responsibility of caring for an automobile choose a driver who thus drives, watch him doing it without a word of protest, warning or direction then avoid liability on the theory she is not liable because the one she chose to drive was actually driving

and her husband was riding in it.

The prior of Mrs. O'Flaherty, while she was in the car.

of her evidence was correct, and it was not necessarily true that

and that the judgment in her favor should be given.

so regard it. We hold it was reasonable error to sustain the

over objection.

We are also of the opinion that the evidence is sufficient

of the evidence. The accident (as shown by the evidence) occurred

3:00 P. M. at the intersection of Milwaukee Avenue and

Milwaukee Avenue runs in a southeasterly and northeasterly direction

and intersects Golf Road which runs east and west. Both roads are

four lane roads, paved with concrete. The intersection is

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the truck was going northward on Milwaukee Avenue at a speed of

fifteen miles per hour, while the auto was coming east at

at a speed of fifty or more miles per hour; that the truck was

in the intersection and had the right-of-way; that the auto (a

nevertheless proceeded across the intersection without

its speed, disregarding signs which warned it to "stop" and "go

down", passed an auto just ahead of it, and then it struck the

intersection struck the top of the truck while such time as to

it over and demolish both vehicles. The evidence indicates that it

Mrs. O'Flaherty was not driving, she was nevertheless by authority of

her husband in control of the machine. The jury found, in

driver killed and was by his side when he was killed. It is

found in the car after the collision. It is also

not true, the car was certainly driven with reckless disregard

corroborate this testimony. The law is capable of doing

one charged with the responsibility of seeing that he

a driver who thus drives, watch him going it with a

protest, warning or direction then avoid liability on the

is not liable because the one and one chance to drive

4.

instead of herself? An automobile is a dangerous instrument. Those in control of it ought to recognize that fact and act with appropriate care and caution. Mrs. O'Flaherty was not a novice. She was an experienced driver. As a case of first impression we would be inclined to hold her liable on the theory that control of such an instrument brings responsibility. Whatever the law may have been, it is certainly now moving in this direction. We are inclined to the view that under the law of this state the negligence of the driver Rittis would be imputed to Mrs. O'Flaherty.

In Kovell v. North Roseland Motor Sales Co., 275 Ill. App. 566, the Second Division of this court held the borrower of a motor vehicle liable for the negligence of a driver who was his agent or servant, citing 42 C. J. 1125 §891, and Barry on Automobiles, 6th Ed., Vol. 2, p. 1205, §1445.

In Brooks v. Snyder, 302 Ill. App. 432, Snyder, the owner of the automobile, was held liable for the negligence of the driver, a repair man, who was driving the car upon his own private business, the owner, however, being a passenger in the car. The opinion cites Blashfield's Cyclopedia of Auto Law (1935) Vol. 5, pp.66-70. It is there held that in such case the negligence of the driver is imputed to the owner.

In Rapers v. Holmes, 292 Ill. App. 116, the husband owner of the car was sitting beside his wife while she drove. The jury returned a verdict against both of them, and the court held the owner liable by reason of his ownership, his presence in the car and his right to control it. This was on the authority of Wheeler v. Dermohwat, 280 Mass, 553, 183 N. E. 55, with other cases.

In Baker v. Massee, 20 Ariz. 201, 179n Pac. 53, the defendant who owned the car was riding in it at the time and a lady friend was driving. A judgment against the owner was affirmed on the theory that the negligence of the driver was imputed to him.

In Bell v. Jacobs, 261 Penn. 204, 104 Atl. 587, the owner (also defendant) was riding in the car while a repair man was driving it. The

5.

Supreme Court sustained a judgment against the owner in spite of the fact he was not personally driving.

In Fuller v. Metcalf, 125 Me. 77, 130 Atl. 875, the defendant's car was drive by his daughter. The defendant owner was present. Although the daughter was on an individual errand for herself at the time, the Supreme Court of Maine affirmed a judgment against the father holding he was liable although the driver was not his servant and said that the acceptance of the services of the driver combined with the right of control was sufficient to make the defendant liable.

In Kaley v. Huntley, 333 Mo. 771, 35 S. W. (2nd) 21, the daughter of the owner was driving the car in which he was riding in the back seat. It was held that since the owner had the right of control he was liable for the daughter's negligence.

In Riley v. Speraw, 42 Ohio App. 207, 181 N. E. 915, the defendant was present in the car at the time of the accident but argued he was not liable because the car was driven by his daughter upon her own business. A judgment against the father was affirmed, the court holding that although the family purpose doctrine did not apply in that state there was a presumption that where a passenger was riding in his own automobile he was liable for the negligence of the driver, irrespective of the question of agency.

In Pratt v. Patrick, 1 K. B. 488, _6 N. C. C.A. (2d)n559, the defendant owned the car, but it was driven by a guest. Defendant sat in the front seat beside the guest. He contended he was not liable because he had turned the machine over to his friend. The court held the owner liable because he had possession, occupation and control and was therefore liable for the negligence of the person driving.

In Wilson v. Moudy, et al., 22 Tenn. App. 356, 123 S. W. (2d)828 a grandfather loaned his car to his grandson. The grandson permitted a minor to drive it and anaaccident occurred. The borrower was riding

Supreme Court sustained a judgment against the owner in spite of the fact he was not personally driving.

In Fulfer v. Metcalf, 135 Mo. 77, 130 Atl. 875, the defendant's car was driven by his daughter. The defendant owner was present. Although the daughter was on an individual errand for herself at the time, the Supreme Court of Maine affirmed a judgment against the father holding he was liable although the driver was not his servant and said that the acceptance of the advice of the driver combined with the right of control was sufficient to make the defendant liable.

In Kelsey v. Huntley, 333 Mo. 771, 38 S. W. 2d (2nd) 31, the daughter of the owner was driving the car in which he was riding in the back seat. It was held that since the owner had the right of control he was liable for the daughter's negligence.

In Riley v. Sperry, 48 Ohio App. 207, 181 N. E. 1315, the defendant was present in the car at the time of the accident but argued he was not liable because the car was driven by his daughter upon her own business. A judgment against the father was affirmed, the court holding that although the family purpose doctrine did not apply in that state there was a presumption that where a passenger was riding in his own automobile he was liable for the negligence of the driver, irrespective of the question of agency.

In Praet v. Patrick, 1 N. H. 453, 6 N. C. C. A. (2d) 553, the defendant owned the car, but it was driven by a guest. Defendant sat in the front seat beside the guest. He contended he was not liable because he had turned the machine over to his friend. The court held the owner liable because he had possession, occupation and control and was therefore liable for the negligence of the person driving.

In Wilson v. Moody, et al., 32 Tenn. App. 386, 133 S. W. 2d (2d) 589 a grandfather loaned his car to his grandson. The grandson permitted a minor to drive it and an accident occurred. The borrower was riding

6.

in the car at the time. Both borrower and driver were minors. The court held the borrower liable for the negligence of the driver because he had the right to control the driver and was an occupant of the car at the time of the accident.

In Haynie, et al. v. Jones, et al., 233 Mo. App. 948, 127 S. W.

(2nd) 105, suit was brought against the borrower and the driver of an automobile. The driver had permission from his father to take the car on the day in question. The son drove it for a while and then permitted his friend, the co-defendant, to drive while the borrower sat beside him in the front seat. There was a judgment against the borrower of the car and the driver. The borrower insisted a verdict should have been directed in his favor because he was not actually driving at the time of the accident. He argued he could be held only for his own tort and not for the negligence of the driver. The court said:

"We are of the opinion that plaintiffs are entitled to recover upon the theory that, as the defendant had the sole right of control and direction of the car at the time in question, and being present in the front seat and assisting in and directing its driving, he was using Mattingly as an instrumentality of his, assisting him in the driving and operation of the car, and that he and Mattingly were jointly driving it, and that defendant made no effort to avoid the collision with the deceased."

In Palmer v. Miller, 310 Ill. App. 582, the Appellate Court for the Fourth District held an owner who occupied the car at the time of the accident was liable for the negligence of the driver if he had not abandoned his right to control the car, or if he exercised or had a right to exercise any control over the driver or operation of the car, or if the ride was for his benefit or for the mutual benefit of himself and the driver. A judgment in favor of plaintiff was affirmed. The defendant owner in this case was a minor. On appeal to the Supreme Court (380 Ill. 256) this judgment was reversed on that ground, the court saying: (page 259)

in the car at the time. If the borrower and driver were identical, the court held the borrower liable for the negligence of the driver because he had the right to control the driver and was in control of the car at the time of the accident.

In Havins, et al. v. Jones, et al., 285 Mo. App. 942, 17 (2d) 102, suit was brought against the borrower and the driver of an automobile. The driver had permission from his father to take the car on the day in question. The son drove it for a while and then permitted his friend, the co-defendant, to drive while the borrower sat beside him in the front seat. There was a judgment against the borrower of the car and the driver. The borrower pleaded a verdict should have been directed in his favor because he was not actually driving at the time of the accident. He argued he could be held only for his own tort and not for the negligence of the driver. The court said:

"We are of the opinion that plaintiffs are entitled to recover upon the theory that, as the defendant had the sole right of control and direction of the car at the time in question, and being present in the front seat and assisting in and directing the driving, he was acting as an instrumentality of him, assisting him in the driving and operation of the car, and that he and defendant were jointly driving it, and that defendant made no effort to avoid the collision with the deceased."

In Palmer v. Miller, 310 Ill. App. 582, the Appellate Court for the Fourth District held an owner who occupied the car at the time of the accident was liable for the negligence of the driver if he had not abandoned his right to control the car, or if he exercised or had a right to exercise any control over the driver or operation of the car, or if the ride was for his benefit or for the mutual benefit of himself and the driver. A judgment in favor of plaintiff was affirmed. The defendant owner in this case was a minor. On appeal to the Supreme Court (300 Ill. 286) this judgment was reversed on that ground, the court saying: (page 286)

"Since appellant's minority prevented him from making a contract for the services of Dan Park for driving the automobile, the contract is not present in the instant case and he cannot be held liable under the doctrine of respondeat superior. Covault v. Nevitt, supra; 1 Cooley on Torts, (3d ed.) 188; Hodge v. Feiner, 90 S. W. (2d) (Mo.) 90, 103 A. L. R. 483; 14 R. C. L. sec. 36, p. 260."

The opinion of the Supreme Court went on to say that it was argued that although the minor was incompetent to make a contract of agency he was present in the car driven for his benefit, and that the law would impute the negligence of the driver to him. The court said it could not agree to this; that it was fundamental in the law of imputed negligence that to impute the negligence of one person to another, such persons must stand in the relation of privity and that there was no such thing as imputable negligence except in cases where such a privity as master and servant or principal and agent existed; that infants were responsible for their own negligence only, citing Smithers v. Henriquez, 368 Ill. 588, and Nonn v. Chicago City Railway Co., 232 Ill. 378. The cause was remanded for another trial.

Defendant O'Flaherty is not a minor. She is married, but the law has emancipated her. She was in control of this automobile. The man she chose to drive drove it. She sat beside him and watched him drive. The jury could reasonably find her responsible for the negligence of Rittis on the theory that his negligence was imputable to her, or that the rule of respondeat superior was applicable, or that Rittis and Mrs. O'Flaherty were on a joint adventure where each was liable for the negligence of either.

The judgments in favor of Mrs. O'Flaherty will be reversed and the causes as to her remanded for another trial.

JUDGMENTS IN FAVOR OF MRS. O'FLAHERTY
REVERSED AND CAUSES REMANDED FOR ANOTHER
TRIAL.

O'Connor and McSurely, JJ., concur.

42576

KARL E. SEYFARTH,
Appellee,

v.
GEORGE E. LEONARD,
Appellant.

INTERLOCUTORY APPEAL FROM
SUPERIOR COURT OF
COOK COUNTY.

319 I.A. 250²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This appeal is from orders entered November 23, 1942, supposed to conform to the mandate of this court issued pursuant to the opinion filed in Seyfarth v. Leonard, 316 Ill. App. 139. As will appear from that opinion, Seyfarth and Leonard were partners engaged in the practice of law in Chicago and by a writing agreed to dissolve it, but no final accounting had been taken. March 29, 1941, Seyfarth filed his complaint in equity to obtain such accounting, the appointment of a receiver pending the suit and other relief. The plaintiff filed his petition and made a motion for the appointment of a receiver on May 2, 1941. The motion was continued from time to time until May 27, 1942, when Judge Nelson entered an order appointing Samuel Berke receiver and defining his duties. Leonard appealed to this court and the order was reviewed in 316 Ill. App. 139.

The opinion sustained the jurisdiction of the Superior Court to appoint a receiver. It however held the order was erroneous in that it directed and authorized the receiver to collect and hold the whole amount of sums claimed to be due to Seyfarth and Leonard as co-partners. It was held the authority of the receiver should have been limited to the collection of only the one-half of such sums as were claimed by Seyfarth. It also appeared numerous items were in the possession of other receivers appointed in the proceedings where such fees were earned. We held these fees should ^{not} be collected by the new receiver appointed in Seyfarth v. Leonard. The opinion concludes:

"The order appointing a receiver is reversed in part and the proceedings are remanded with directions to limit the authority of the receiver to the collection of the portion of the fees claimed by the plaintiff, except as to those fees now in the hands of other receivers who, the record shows, will hold such fees until this cause is terminated."

Defendant filed a petition for rehearing, which was denied; then made a motion that the opinion be clarified, which was also denied. The mandate issued was presented to the trial court and the orders now appealed from entered. This further appeal by Leonard followed. Plaintiff made a motion to dismiss the appeal, which was granted. Defendant made a motion to set aside the order of dismissal. This motion we reserved to the hearing. Briefs have been submitted and we have listened to oral arguments.

Defendant argues the amending order does not conform to the opinion and the mandate, ~~or~~ either of them. This contention must be sustained. The original order of May 27, 1942, expressly found the receiver should be appointed for items named "and such other sums as have been collected since May 2, 1941, and such other sums as shall hereafter be allowed to or collected and received by the parties hereto from the proceeds of the liquidation of the law firm of Seyfarth and Leonard, but excepting, however, all sums received from cases in which plaintiff or defendant was entitled under the terms of the partnership agreement to retain in full". The amended order of November 23, 1942, authorizes and directs the receiver to collect and take possession and custody of one-half of all the fees collected and to be collected by the defendant, George Edward Leonard," etc. In other words, while conforming to the order and mandate in limiting the receiver's authority to collect one-half of the amount claimed by Seyfarth, it removes the limitation in the original order of May 27, 1942, which restricted the receiver's powers of collection to sums such as had been collected since May 2, 1941, the date when the motion for the appointment of a receiver was first made.

The proceedings prior to the entry of each of the orders (one by Judge Nelson, the other by Judge Lupe) show clearly that it was not

3.

the intention of either judge to disturb the status quo by requiring defendant to turn over money which had been collected prior to May 2, 1941, when the motion for receiver was first made.

Defendant appealed from the order of May 27, 1942. He did not claim any error in respect to this limitation of time put upon the receiver. Plaintiff Seyfarth did not appeal from that order or argue that it was in this or in any other respect erroneous. On the other hand he contended for its affirmance. The mandate expressly affirms the order in all respects except those in which it was found to be erroneous. It would seem that the language of the amending order was in this respect inadvertent. We would so hold were it not for specific directions in the second order indicating a contrary intention. The original order, with other items, gave directions as to fees arising in three suits, amounting to the sum of \$1,169.50 in a Superior Court Case No. 576400, \$918.66 in Circuit Court Case No. B-222825, and \$1,346.15 in a Bankruptcy Case No. 70209, a total of \$3,432.31. The allegations of plaintiff's complaint show that all these items were collected by Leonard prior to the motion made for a receiver. The order appealed from directs that one-half of these sums, or \$1,716.15, shall be turned over to the receiver. This is clearly erroneous and not in conformity with that part of the order which was affirmed.

Defendant contends the amended order is also contrary to the mandate and opinion of this court in that it provides for the receiver "to take any and all action in this or in any other case or court as may be necessary to effect collection of the sums herein directed to be collected by said receiver, to hold any and all moneys collected and received herein, and to disburse the same only upon order of court herein." This language could plausibly be construed as directing the receiver to proceed to collect the moneys now in the hands of other receivers, contrary to the opinion and the mandate of this court, as heretofore recited. We hold these orders are not in conformity with the mandate or opinion of this court. For this reason the motion to set aside the order dismissing the defendant's appeal will be allowed; the orders

4.

appealed from will be reversed and the cause remanded to the trial court with directions to enter orders in conformity with the opinion and mandate of this court.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McSurely, JJ., concur.

approach to the study of the history of the United States
with a view to the establishment of a new and
more accurate and complete history of the country.

THE HISTORY OF THE UNITED STATES

OF THE HISTORY OF THE UNITED STATES

42349

RUTH V. CANNON,

Appellant,

vs.

MARIE N. MARMOR, as Executrix and
Trustee under the Last Will and
Testament of Alexander Marmor,
Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

319 I.A. 251

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This case presents the question whether plaintiff is the owner of the note and trust deed in a foreclosure proceeding.

The master to whom the case was referred first found that plaintiff was the owner, and a decree of foreclosure and sale followed. Subsequently the defendant, Marie Marmor, executrix and trustee of the estate of her husband, filed an answer in which she asserted that the note and trust deed were not valid and existing liens on the premises conveyed; that the note had been paid but not canceled and that she herself is the rightful owner of the premises, and asked that the sale be declared void. After hearing further evidence the master found for the defendant and recommended a decree declaring void the sale, the note and trust deed, and that she was the owner of the premises conveyed in the trust deed, free and clear of all liens claimed under the note and trust deed. The chancellor approved this second report and entered a decree as recommended, and from this plaintiff appeals.

June 30, 1927 the note and trust deed were executed by Meyer Finkel to secure the principal of \$10,000, with interest at 6 per cent per annum, and conveyed as security property at 298-10 E. Pershing Road, Chicago.

Sidney Missner, the attorney for plaintiff, testified that the

RUITH V. CHAMBERLAIN

(continued)

• 55

Testament of Alexander, Attorney,
Trustee under the last will and
MARIN N. ALAMOR, as executor and
Applicant.

appeals.

Sidney Manner, the attorney for plaintiff, testified that in June 30, 1937 the note and taxes were paid by the bank to secure the principal of \$10,000, with interest at 6 per annum, and conveyed as security property at 208-12 W. Madison Road, Chicago.

2.

securities involved belonged to plaintiff; that she acquired title from one Edward Kallish by paying \$1100, and that she bought the mortgage in her own name; that it was purchased from the Fidelity Investors. Subsequently Missner testified that he himself advanced the money to plaintiff and that he was the real owner of the securities. Subsequently an official of the Fidelity Investors testified that he had examined the records of the Fidelity Investors and that no record appeared of this concern receiving anything from Missner. Thereupon Missner admitted that he had not paid the Fidelity Investors anything. The master found Missner's testimony to be inconsistent and unsatisfactory. Plaintiff was a stenographer employed by the Fidelity Investors; she did not appear to testify, and the master could properly find that Missner's testimony that she had bought the papers from Kallish was not convincing. Kallish did not testify.

Edgar Greenebaum testified that his company sold Dr. Marmor nine mortgages, including the one in question; that he handled the matter personally with Dr. Marmor, who paid for the notes with checks and some cash. Morris Fisher testified that he was in the real estate business and that these notes were bought pursuant to a written agreement between Marmor and himself; that Victor Frank was also interested in the matter as an attorney. The notes when purchased from Greenebaum were many years in default. Samuel G. Moffett testified that Dr. Marmor told him of these purchases from Greenebaum and that he expected to turn them over to Victor Frank for the purpose of obtaining title or foreclosing. There is testimony that Frank, instead of proceeding to obtain title to the premises conveyed in the trust deed, deposited the papers with the Continental Discount Corporation to secure his collateral note for \$1300 or \$1400; that this was partially paid off, leaving a balance of \$1100; that subsequently the Discount corporation sold the papers to a Mr. Kallish.

Pursuant to the terms of a contract made between Dr. Marmor in his lifetime and Morris Fisher, title to the property involved was in the name of Sylvia Welesky, as nominee of Marie Marmor. The answer of

...involved ... to ...
... Kallish by saying ...
... in her own name; that it was purchased from ...
... Kallish that he had ...
... to plaintiff and that he was not aware of the ...
... Kallish an official of the ...
... had examined the records of the ...
... appeared of this concern receiving ...
... Kallish admitted that he had ...
... The master found ...
... Plaintiff was a ...
... she did not appear to testify, ...
... Kallish's testimony that she had bought ...
... convincing. Kallish did not testify.

... Kallish testified that his ...
... mortgages, including the one in ...
... personally with Dr. ...
... cash. Morris Fisher testified that he was in ...
... and that these notes were bought pursuant to ...
... between Kallish and Kallish; that Kallish ...
... matter as an attorney. The notes were ...
... many years in default. Samuel ...
... told him of these purchases from ...
... turn them over to Victor Frank for the purpose of obtaining ...
... foreclosing. There is testimony that Frank, ...
... obtain title to the property conveyed in ...
... papers with the Continental Discount Corporation ...
... collateral note for \$1500 or 1400; that this ...
... leaving a balance of ...
... sold the papers to a ...

Pursuant to the terms of a contract made between Dr. ...
... Little and Morris Fisher, title to the property involved was in the ...
... name of Sylvia Weisberg, as nominee of ...

3.

Victor Frank disclaims any interest in the real estate involved. The answer of Morris Fisher stated that the notes were acquired pursuant to his contract with Marmor and that they were in the possession of Marie N. Marmor.

Missner testified that before furnishing plaintiff the money to purchase the papers he examined the tract books and records of the Circuit and Superior courts. The master found that from that examination he should have been put on notice that persons other than Kallish claimed title. Underneath that portion of the endorsement on the note releasing personal liability was a blue background evidencing certain obliterations, and in the same handwriting were the words "Victor P. Frank, owner of said note." The master also found that the note and mortgage were delivered to Frank by Marmor for cancellation and release of record when title was secured by Marmor's nominee, Sylvia Welefsky, and that Frank at no time had legal title to the mortgage note or coupons and therefore did not transfer any legal title to the Continental Discount Corporation; that the legal title to the instruments is in defendant Marie N. Marmor, executrix and trustee under the last will and testament of Alexander W. Marmor, deceased, and that Ruth V. Cannon, plaintiff, had no right or title to any of the documents. The answer filed by Frank disclaiming any interest in the real estate involved, was in contradiction to the endorsement on the notes to the effect that he was the owner. In Borg v. Finegold, 282 Ill. App. (abst.) 631, Stern, the secretary of a bondholders' committee with whom bonds had been deposited, wrongfully hypotheated them with Feingold; the committee brought replevin against him and the court sustained this, saying that the evidence clearly showed that Stern had no title to the notes in question and had no right to negotiate them. See also Merchants' Loan & Trust Co. v. Walter, 205 Ill. 647, and Hide and Leather Nat. Bank v. Alexander, 184 Ill. 416. The evidence fails to show that Ruth Cannon, plaintiff, ever obtained possession of the papers in question. It is admitted that merely her name was used and that she was a dummy for Missner. She never appeared to testify.

4.

Plaintiff says that defendant cannot make her claim except by a cross-bill. The claims of defendant were made in her answer and amended answer, and no objection was made to this. After the master had prepared his amended report defendant filed a petition asking for its confirmation and for leave to withdraw the original notes in question. The court granted leave to file such a petition, which was done, and no answer or objection thereto was ever filed by plaintiff.

The master having seen the witnesses and concluded that plaintiff was not an innocent purchaser, and his report having been approved by the chancellor, the findings will not be disturbed unless they are manifestly against the weight of the evidence. Pasedach v. Auw, 364 Ill. 491, 496; Smuk v. Hryniewiecki, 369 Ill. 546, 556; Mruk v. Mruk, 379 Ill. 394, 401.

Upon the record presented we cannot say that the conclusions of the master and chancellor are manifestly against the weight of the evidence, and the decree will be affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

42395

JAMES H. KEARNEY,
Appellant,
vs.
LOUIS SPINIOLA,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

319 I.A. 251²

Plaintiff brought suit to recover for personal injuries received and damages to his automobile caused, as he claims, by the negligent operation of defendant's truck. The case was submitted to the court without a jury and the judgment was for the defendant.

The occurrence took place in the early afternoon of May 19, 1941, at North avenue, which runs east and west, and its intersection with 18th avenue, which runs north and south, in Melrose Park, Cook County. Plaintiff was going easterly on North avenue, driving his Packard auto. He testified that at the place in question there are no buildings or sidewalks - all empty lots. North avenue at this point is a state highway with four lanes - two for eastbound traffic and two for westbound. Plaintiff says that as he approached 18th avenue there were no cars ahead of him but several behind him and another car on his left going in the same direction; that he was traveling between 35 and 40 miles an hour; that when he was about 40 or 50 feet from 18th avenue he first saw defendant's truck; that he saw it headed north, come to a stop, and believed defendant was intending to wait until the traffic had cleared, but instead started across North avenue and stopped in the outer or southern lane in the direct path of plaintiff's automobile; that to avoid hitting it plaintiff swerved to the south and drove his car into a ditch about 10 or 15 feet south of North avenue, receiving injuries to his person and damages to his car.

JAMES H. LEAHY, Jr.
Appellant,
vs.
LOUIS SPINALE,
Appellee.

MR. JUSTICE MCGUIRE DELIVERED THE OPINION.
Plaintiff brought suit to recover for personal injuries received and damages to his automobile caused, as he claims, by the negligent operation of defendant's truck. The case was brought to the court without a jury and the judgment was for the defendant.
The occurrence took place in the early afternoon of May 19, 1941, at North Avenue, which runs east and west, and the intersection with 18th Avenue, which runs north and south, in Clark County, Indiana. Plaintiff was riding east only on North Avenue, driving his Packard auto. He testified that at the place in question there are no buildings or sidewalks - all empty lots. North Avenue at this point is a state highway with four lanes - two for eastbound traffic and two for westbound. Plaintiff says that as he approached 18th Avenue there were no cars ahead of him but several behind him and another car on his left going in the same direction as he was traveling. Between 35 and 40 miles an hour; that when he was about 10 to 20 feet from 18th Avenue he first saw defendant's truck; that he saw it headed north, come to a stop, and collected himself and started to wait until the traffic had cleared, but instead started across North Avenue and stopped in the center of the lane in the direct path of plaintiff's automobile; that to avoid hitting it he turned south to the south and drove his car into a ditch about 15 or 20 feet south of North Avenue, receiving injuries to his person and damages to his car.

2.

Defendant testified that there was a stop sign on 18th avenue about 8 or 10 feet from the south edge of North avenue; that there are no buildings at this intersection; he stopped his truck at the stop sign and looked both ways and saw that traffic was clear and started across North avenue; that he saw that the eastbound cars did not slow down, so he stopped his truck when its front end was about 4 feet in North avenue; that plaintiff's car left the street pavement about 200 feet west of 18th avenue and swerved to the right in a southerly direction, going about 50 miles an hour. The other eastbound car, which was going to the left of plaintiff's car, swerved to the north and passed the truck without mishap.

Plaintiff argues that North avenue at this point is a state highway; that section 70 of the Motor Vehicles Act (Ill. Rev. Stat. 1941, ch. 95 1/2, par.167)entitled him to the right of way. The statute provides that regardless of the directions the vehicles are going, right of way shall be given to those upon such highway. Manifestly the application of this statute depends upon the surrounding circumstances, the distance of the cars from the intersection and their speed. It does not mean that the driver on the state highway has the right of way regardless of the presence or situation of other vehicles approaching or on the intersection. The same degree of care is required of the driver on a state highway as is required of the driver of a vehicle on the intersecting street. It should be noted that in the instant case none of the other eastbound cars on North avenue were involved. The car to plaintiff's north, or left-hand side, passed the truck by swerving to the north. If plaintiff had done the same thing he would have received no injuries.

Many cases have been cited but none precisely in point. In Mantonya v. Wilbur Lumber Co., 251 Ill. App. 364, the driver of the truck approaching the highway did not stop, and it also appears he was going at a high rate of speed. These are not the circumstances before us. In Coleman v. Hait, 293 Ill. App. 615, the court says very aptly that

Defendant testified that there was a stop sign at both

avenue about 8 or 10 feet from the south edge of North Avenue; that there are no buildings at this intersection; he stopped his truck at the stop sign and looked both ways and saw that the light was of red and started across North Avenue; that he saw that the eastbound cars did not slow down, so he stopped his truck when the light was about 4 feet in North Avenue; that Plaintiff's car left the stop sign about about 200 feet west of 18th Avenue and swerved to the right in a southerly direction, going about 50 miles an hour. The other eastbound car, which was going to the left of Plaintiff's car, swerved to the north and passed the truck without stopping.

Plaintiff argues that North Avenue is a state

highway; that section 70 of the Motor Vehicles Act (Ill. Rev. Stat. 1941, ch. 95 1/2, par. 187) entitled him to the right of way. The statute provides that regardless of the direction the vehicle was going, right of way shall be given to those upon such highway. He literally the application of this statute depends upon the surrounding circumstances, the distance of the cars from the intersection and their speed. It does not mean that the driver on the state highway has the right of way regardless of the presence or situation of other vehicles approaching or on the intersection. The same degree of care is required of the driver on a state highway as is required of the driver of a vehicle on the intersecting street. It should be noted that in the instant case none of the other eastbound cars on North Avenue were involved. The car to Plaintiff's north, on left-hand side, passed the truck by swerving to the north. If Plaintiff had done the same thing he would have received no injuries.

Many cases have been cited but none are clearly in point. In

Mantonys v. Wilbur Lumber Co., 261 Ill. App. 386, the driver of the truck approaching the highway did not stop, and it also appears he was going at a high rate of speed. Those are not the circumstances before us. In Coleman v. Hatt, 283 Ill. App. 818, the court says very aptly that

3.

the rule that one approaching the intersection of highways may assume that persons approaching will observe the law with respect to the right of way, is subject to a reasonable application, and it is therefore generally recognized that the rule is subject to the facts and circumstances appearing in the particular case.

The trial court was evidently of the opinion that the plaintiff in the operation of his car was guilty of negligence which caused the accident; that if as he approached the intersection he had been going at a proper rate of speed and with his car under control, he would not have met with the accident. It is not disputed that defendant, after making the stop at the stop sign south of North avenue, moved slowly from a dead stop, and after his truck had gone only 4 feet across the south line of North avenue he again stopped his truck to allow the eastbound traffic to pass. The eastbound traffic lane was 20 to 25 feet in width and defendant's truck occupied only 4 feet of the southern part of this. Defendant was not guilty of the negligence charged.

We cannot say that the conclusion and judgment of the trial court is manifestly against the weight of the evidence. It is therefore affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

2.

the rule that one approaching the intersection of a highway at a right angle has the right of way, and it is subject to a reasonable exception, and it is therefore generally recognized that the rule is subject to the facts and circumstances appearing in the particular case.

The trial court was evidently of the opinion that the defendant in the operation of his car was guilty of negligence which caused the accident; that if as he approached the intersection he had been going at a proper rate of speed and with his car under control, he would not have met with the accident. It is not disputed that defendant after making the stop at the stop sign south of 4th Avenue, moved slowly from a dead stop, and after his truck had gone only a few feet the south line of 4th Avenue he again stopped his truck to allow the eastbound traffic to pass. The eastbound traffic was then 20 to 25 feet in width and defendant's truck occupied only 4 feet of the southern part of this. Defendant was not guilty of the negligence charged.

We cannot say that the conclusion and judgment of the trial court is manifestly against the weight of the evidence. It is therefore affirmed.

ALL THIS.

Matchett, P. J., and O'Connor, J., concur.

42361

CUMMINGS-LANDAU LAUNDRY MACHINERY
CO., a Corporation,

Appellee,

v.

HARRY KOPLIN, et al.,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

319 I.A. 252

366

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 31, 1942, defendants, Harry Koplin and Zephyr Laundry Machinery Co., a corporation, were found guilty of violating an interlocutory order awarding a writ of injunction "and either or both" of them were decreed to pay a fine of \$3,000 to the Clerk of the Court; that defendant Koplin stand committed to the County Jail until the fine was paid, and they appeal.

The record discloses that April 14, 1941, the plaintiff filed its verified complaint against defendants praying that defendants be restrained from "selling, dealing, installing, delivering, distributing," etc., certain machinery manufactured by defendant, Zephyr Laundry Machinery Company, and May 28, 1941, the court ordered that a temporary injunction issue restraining defendants as prayed for. This order was entered on the pleadings - no evidence of any moment was introduced. January 9, 1942, plaintiff by leave of court, filed its petition for a rule on defendants to show cause why they should not be adjudged in contempt of court for violating the injunctional order. January 15, 1942, the hearing on the contempt matter was commenced and March 31, 1942, the order finding defendants guilty of contempt was entered.

The basis for the suit was a written contract which plaintiff claimed defendants had violated and were continuing to do so. On the hearing to determine whether a temporary writ of injunction should issue, and the hearing on the contempt made thereafter, both

CUMMINGS-LANGLAN LAUNDRY MACHINERY CO., a Corporation,
Appellee,

HARRY KOPIN, et al.,
Appellants.

U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

310
100-10000

MR. JUSTICE O'DONOGHUE DELIVERED THE FOLLOWING OPINION:

March 31, 1942, defendants, Harry Kopin and Zephyr Laundry Machinery Co., a corporation, were found guilty of violating an injunctive order awarding a writ of injunction "and either or both" of them were decreed to pay a fine of \$5,000 to the clerk of the Court; that defendant Kopin stands committed to the County Jail until the fine was paid, and they appeal.

The record discloses that April 14, 1941, the plaintiff filed its verified complaint against defendants praying that defendants be restrained from "selling, dealing, installing, delivering, distributing," etc., certain machinery manufactured by defendant, Zephyr Laundry Machinery Company, and May 26, 1941, the court ordered that a temporary injunction issue restraining defendants as prayed for. This order was entered on the pleadings - no evidence of any moment was introduced. January 2, 1942, plaintiff by leave of court, filed its petition for a rule on defendants to show cause why they should not be adjudged in contempt of court for violating the injunctive order. January 15, 1942, the hearing on the contempt matter was commenced and March 31, 1942, the order finding defendants guilty of contempt was entered.

The basis for the suit was a written contract which plaintiff claimed defendants had violated and were continuing to do so. On the hearing to determine whether a temporary writ of injunction should issue, and the hearing on the contempt made thereafter, both

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parties treated the contract as valid and binding. The case on the merits is still pending. May 1, 1942, which was a month after the contempt order was entered, defendants moved to amend their answer to the complaint which was allowed and for the first time defendants contended that the contract of December 2, 1935, which as stated was the basis of plaintiff's suit, was void because it was in violation of §1, of the Sherman Anti-Trust Act (15 U. S. C. A. and paragraphs 569 and 573, of ch. 38, Ill. Rev. Stat. 1941) and they moved to dissolve the injunction, the motion was denied and defendants prosecuted an appeal to this court. October 26, 1942, we handed down an opinion sustaining defendants' contention that the contract was void, being in violation of §1, of the Sherman Anti-Trust Act, and the injunctive order was reversed. Afterward plaintiff filed a petition for rehearing and November 14, 1942, we filed a supplemental opinion and denied the rehearing, No. 42384, Cummings-Landau Laundry Machinery Co. a corp. v. Koplin, et al. In the opinion we said that if the contract in question had been made after the passage of the Miller-Tydings Act in 1937, and the Fair Trade Act of this State, (ch. 121 1/2 Par. 188 et seq., Ill. Rev. Stat. 1941) it would have been valid. Counsel for plaintiff in the petition for rehearing said: "The Court has overlooked the fact that this contract was renewed December 2, 1938, by virtue of its own terms," and that the record showed defendants had recognized the contract in full force and effect as late as January 23, 1940; that when the case was heard on its merits plaintiff would be faced with the opinion of this court holding that the contract was void. In our supplemental opinion, in passing on this contention we said that: "when the case is heard on its merits, both parties will be permitted to put in competent evidence tending to show that the contract is valid or invalid."

There is considerable evidence in the record which was introduced on the contempt proceeding, plaintiff's evidence tending to show that the injunctive order was flagrantly violated by defendants while

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the evidence on behalf of defendants, they contend, shows the order had not been violated. But as above stated, all of this was on the theory that the contract of December 2, 1935, was valid and binding. The chancellor found from the evidence that defendants were guilty of violating the order and we think his finding was clearly warranted. But since we held that the contract was void (the question, whether it was a binding obligation because of its renewal, etc., after the passage of the Miller-Tydings Act and the Fair Trade Act, not being before us and no evidence being offered on that question) the order of contempt cannot stand. Eastman v. Dole, 213 Ill. App. 364; Salvage Process Corp. v. Acme Tank Cleaning Process Corp., 86 Fed. 2d. 727.

If on the hearing it should be determined that the contract is valid by reason of the passage of the Miller-Tydings Act and the Fair Trade Act, on account of what had been done by the parties after these acts became effective, the question whether defendants have been guilty of contempt can then be determined by the chancellor.

For the reasons stated, the order of the Superior court of Cook county is reversed.

ORDER REVERSED.

Matchett, P. J., and McSurely, J., concur.

42399

J. KENT GREENE,
Appellant,

v.

JOHN TOMAN, UNITED STATES FIDELITY
AND GUARANTY COMPANY,
Appellees.

APPEAL FROM
MUNICIPAL COURT,
OF CHICAGO

319 1.A 232

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal court of Chicago against Alexander and Kathleen S. Moseley, John Toman, former sheriff of Cook county, United States Fidelity and Guaranty Company (the surety on Sheriff Toman's bond) and Thomas J. O'Brien, present sheriff, to recover \$600. Only Toman, the former sheriff, and the Guaranty Company were served. They filed their motion to strike the complaint [statement of claim]. The motion was sustained, plaintiff elected to stand by his statement of claim, the suit was dismissed as to the two defendants served, and plaintiff appeals.

The question for decision is whether the statement of claim states a cause of action. The material allegations, so far as it is necessary to state them here, are that a suit was pending in the Superior court of Cook county, in which Kathleen E. Moseley was plaintiff and Alexander Moseley, defendant. That Alexander Moseley was represented in that case by J. Kent Greene, attorney, and that from time to time Greene was paid by his client \$600 for his services. That such payments were made with the consent of both parties to the Superior court suit. That afterward Greene was ordered to pay the \$600 to the clerk of the Superior court and upon his failure to do so, a mittimus was issued directed to the sheriff, to take Greene into custody until he should purge himself of the alleged contempt. That other orders were afterward entered staying

J. KENT GREENE, Appellant,

v.

JOHN TOMAN, UNITED STATES FIDELITY AND GUARANTEE COMPANY, Appellees.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Municipal Court of Chicago against Alexander and Kathleen S. Mosely, John Toman, former sheriff of Cook county, United States Fidelity and Guaranty Company (the surety on Sheriff Toman's bond) and Thomas J. O'Brien, present sheriff, to recover \$800. Only Toman, the former sheriff, and the Guaranty Company were served. They filed their motion to strike the complaint [statement of claim]. The motion was sustained, plaintiff elected to stand by his statement of claim, the suit was dismissed as to the two defendants served, and plaintiff appealed. The question for decision is whether the statement of claim states a cause of action. The material allegations, so far as it is necessary to state them here, are that a suit was pending in the Superior Court of Cook county, in which Kathleen S. Mosely was plaintiff and Alexander Mosely, defendant. That Alexander Mosely was represented in that case by J. Kent Greene, attorney, and that from time to time Greene was paid by the client \$100 for his services. That such payments were made with the consent of both parties to the Superior Court suit. That after Greene was ordered to pay the \$100 to the clerk of the Superior Court and upon his failure to do so, a writ was issued directed to the sheriff to take Greene into custody until he should purge himself of the alleged contempt. That other orders were afterward entered staying

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the mittimus and on April 21, 1938, an order was entered by the Superior court that the stay of the mittimus be terminated and that the mittimus issue instanter for the commitment of Greene; that on the day this order was entered, Greene deposited the \$600 with the sheriff and 5 days thereafter, April 26, he was given leave to file a petition in that cause; that on Saturday, July 9, 1938, Greene's petition was set for hearing and it was ordered that the sheriff pay instanter the \$600 to Alexander Moseley and at the same time, Alexander Moseley was ordered to pay Kathleen E. Moseley for her attorneys, \$390 out of the \$600. That Alexander Moseley paid \$60 for reporter's fees and \$150 to Kathleen E. Moseley, making a total of \$600. That Saturday, July 9, 1938, the day this order was entered and the moneys paid, was a half holiday and shortly after the order was entered the clerk's office and the sheriff's office closed for the day and it was impossible for Greene to perfect his appeal, to serve notice of appeal or to obtain an appeal bond until the following Monday, July 11; that after the entry of the order of July 9, Greene talked to the deputy sheriff, who had the matter in charge and notified the deputy orally that he intended to appeal to the Appellate court; that the deputy sheriff at that time promised that he would not comply with the order and pay out the money until he notified Greene; that Greene said the appeal would be perfected and a supersedeas bond filed; that on the opening of the clerk's office Monday morning July 11, Greene served notice of appeal; that on July 25 or 26 following, Greene examined the records in the clerk's office and learned for the first time that a second order had been entered July 9, ordering the sheriff to pay the \$600 instanter to Alexander Moseley. And it is charged that the two Moseleys and their attorneys, the deputy sheriff and his attorney, "entered into an illegal conspiracy" to withdraw and pay over the money as above stated.

It is further alleged that the appeal was taken to this court where a number of orders of the Superior court, including the one which ordered the sheriff to pay \$600 instanter, were reversed and set aside. Then follow allegations of the surety company executing

It is further alleged that the appeal was taken to this court where a number of orders of the Superior court, including the one which ordered the sheriff to pay \$800 instantor, were reversed and set aside. Then follow allegations of the surety company executing pay over the money as above stated.

and his attorney, "entered into an illegal conspiracy" to withdraw and charged that the two Moseleys and their attorneys, the deputy sheriff sheriff to pay the \$800 instantor to Alexander Moseley. and it is time that a second order had been entered July 9, ordering the examined the records in the clerk's office and learned for the first Greene served notice of appeal; that on July 25 or 26 following, Greene that on the opening of the clerk's office Monday morning July 11, Greene said the appeal would be perfected and a supersedeas bond filed; with the order and pay out the money until he notified Greene; that that the deputy sheriff at that time promised that he would not comply the deputy orally that he intended to appeal to the appellate court; talked to the deputy sheriff, who had the matter in charge and notified Monday, July 11; that after the entry of the order of July 9, Greene serve notice of appeal or to obtain an appeal bond until the following the day and it was impossible for Greene to perfect his appeal, to was entered the clerk's office and the sheriff's office closed for and the moneys paid, was a half holiday and annually after the order of \$800. That Saturday, July 2, 1938, the day this order was entered for reporter's fees and \$150 to Kathleen Moseley, making a total attorneys, \$350 out of the \$800. That Alexander Moseley paid \$80 Alexander Moseley was ordered to pay Kathleen Moseley for her pay instantor the \$800 to Alexander Moseley and at the same time, petition was set for hearing and it was ordered that the sheriff petition in that cause; that on Saturday, July 9, 1938, Greene's sheriff and 5 days thereafter, April 26, he was given leave to file the day this order was entered, Greene deposited the \$800 with the the moneys issue instantor for the commitment of Greene; and the Superior court that the day of the moneys be terminated and the the moneys and on April 21, 1938, an order was entered by the

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the bond as surety for Sheriff Toman. We reviewed the facts in our opinion filed October 3, 1939 (Moseley v. J. Kent Greene, #40526.)

Plaintiff in his brief, after stating the facts which he says are sufficient to warrant a reversal of the order appealed from, adds an additional reason, citing Ill. Rev. Stat. 1941, chap. 77, par. 5, which provides that "No execution shall issue against the body of the defendant except when the judgment shall have been obtained for a tort committed by such defendant, and it shall appear *** that malice is the gist of the action, and except when the defendant shall refuse to deliver up his estate for the benefit of his creditors." This section is in no way applicable to the facts in the case at bar. Here plaintiff Greene was ordered to pay \$600 to the sheriff to purge himself of a claimed contempt of court. He thereupon paid the money to the sheriff and some time afterward, another order was entered that the sheriff pay the money instantler to Moseley. It is obvious that the section quoted is wholly inapplicable.

Plaintiff in his brief further says that the notice of appeal without bond operates as a supersedeas until the bond is filed, and continuing he says: "This statute does not limit the notice [of appeal] to writing." This contention cannot be sustained. Rules 33 and 34 of our Supreme court require notice of appeal to be in writing.

It seems to be agreed that Greene, in appealing from the orders of the Superior court, did not file a supersedeas bond and the appeal was not made a supersedeas for the reason that before he had time to do so, the sheriff had paid out the money.

Plaintiff further contends that after the order of July 9 was entered by the Superior court, he had 20 days within which to serve his notice of appeal and 30 days to file the supersedeas bond, and Section 82, of the Civil Practice Act is relied upon. The pertinent portion of that section provides that:

"An appeal to the Appellate or Supreme Court shall operate as a supersedeas only if and when the appellant, after notice duly served, shall give and file a bond in a reasonable amount, to secure

the bond as surety for Sheriff Brown. The plaintiff in his brief, after stating the facts which

complain filed October 3, 1908 (Complaint v. Sheriff Brown, 100 Cal. 471).

Plaintiff in his brief, after stating the facts which

are sufficient to warrant a reversal of the order appealed from,

adds an additional reason, citing Ill. Civ. App., 1907, 1908, 1909.

par. 5, which provides that "no execution shall issue out of the

body of the defendant except when the judgment shall have been

obtained for a tort committed by such defendant, and it shall appear

*** that malice is the gist of the action, and except when the

defendant shall refuse to deliver up his goods for the benefit of his

creditors." This action is in no way so liable to the facts in the

case at bar. Here plaintiff Brown was ordered to pay \$500 to the

sheriff to purge himself of a criminal contempt of court. The sheriff

paid the money to the sheriff and some time afterwards, another order

was entered that the sheriff pay the money instant to sheriff. It

is obvious that the action quoted is wholly inadmissible.

Plaintiff in his brief further says that the notice of appeal

without bond operates as a supersedeas until the bond is filed, and

continuing he says: "This statute does not limit the notice [of appeal]

to writing." This contention cannot be sustained. Rules 35 and 36

of our Supreme Court require notice of appeal to be in writing.

It seems to be agreed that Brown, in appealing from the order

of the Superior Court, did not file a supersedeas bond and the appeal

was not made a supersedeas for the reason that before he had time to

do so, the sheriff had paid out the money.

Plaintiff further contends that after the order of July 3 was

entered by the Superior Court, he had 30 days within which to a

his notice of appeal and 30 days to file the supersedeas bond, and

Section 82, of the Civil Practice Act is relied upon. The pertinent

portion of that section provides that:

"An appeal to the Appellate or Supreme Court shall operate as

a supersedeas only if and when the appellant, after notice only

served, shall give and file a bond in a reasonable amount, to secure

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the adverse party. *** If notice of appeal is served within twenty (20) days after the entry of the order, determination, decision, judgment or decree complained of, and if bond is given and filed and approved within thirty (30) days after such entry, or within such further extended time as the trial court may allow within such thirty (30) days or any extension thereof, the notice of appeal shall, upon the approval of the bond, operate as a supersedeas."

It will be noted that the section provides that the appeal shall operate as a supersedeas "only if and when" the appellant shall give and file a bond and that "the notice of appeal shall, upon the approval of the bond, operate as a supersedeas." We think it clear that under the wording of this section, the judgment order dismissing plaintiff's suit was not stayed for the reason that he filed no bond. Professor McCaskill, in his Illinois Civil Practice Act Annotated, in discussing Section 82 of the Civil Practice Act says: "The court may fix the date when the bond is to be filed, but the date of filing bond is no longer jurisdictional and if the bond is not filed within the time set, such failure will have no effect upon the appeal itself, nor will it operate to bar the appellant's right to supersedeas. The bond may be filed at a later date, and when filed and approved, the notice of appeal will operate automatically as a supersedeas." And in a footnote the author says: "But until [the bond is] filed the proceedings in the trial court are not stayed".

The Civil Practice Act which went into effect January 1, 1934, did not materially change the law as to how and when an appeal would operate as a supersedeas. Section 92 of the old Practice Act, Smith- Hurd Ill. Rev. Stat. 1933, chap. 110, §92, provided: "Appeals shall be prayed for and allowed at the term at which the judgment, order or decree is rendered, and the party praying for such appeal shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the clerk of the court from which the appeal is prayed, bonds, in a reasonable amount, to secure the adverse party". And it has been uniformly held under this statute, that although in allowing the appeal the trial judge fixed the time for filing the bond, not less than 20 days, yet the operation of the

the adverse party. If notice of appeal is given within the time prescribed by the rules, the appeal is perfected. (20) days after the entry of the order, notwithstanding the fact that the judgment or decree complained of, and its enforcement, are still in effect, the appeal is perfected. (30) days after such entry, or within such further extended time as the trial court may allow after such notice, the appeal is perfected. (30) days or any extension thereof, the notice of appeal must be filed, and the appeal is perfected. It will be noted that the section provides that the appeal shall operate as a supersedeas "only if and when" the appellant shall give and file a bond and that "the notice of appeal shall, upon the filing of the bond, operate as a supersedeas." It is thought that the purpose of this section, the judgment being in effect, is to prevent a suit from being stayed for the reason that it is not perfected. In his Illinois Civil Practice and Procedure, 1934, McGaskill, in his Illinois Civil Practice and Procedure, 1934, Section 82 of the Civil Practice Act says: "No court shall stay the execution of a judgment or decree when the bond is to be filed, but the date of filing bond is no longer jurisdictional and if the bond is not filed within the time so prescribed, the failure will have no effect upon the appeal itself, nor will it operate to bar the appellant's right to amend. The bond may be filed at a later date, and when filed and approved, the appeal shall operate automatically as a supersedeas." and in a footnote the author says: "But until [the bond is] filed the proceedings in the trial court are not stayed". The Civil Practice Act which went into effect January 1, 1934, did not materially change the law as to how and when an appeal could be taken as a supersedeas. Section 82 of the old Practice Act, which was in effect, provided: "The appeal shall be stayed for and allowed at the term at which the judgment, order or decree is rendered, and the party praying for such stay shall, within such time, not less than twenty days, as shall be limited by the court, give and file in the office of the clerk of the court the bond which the appeal is prayed, bonds, in a reasonable amount, to secure the adverse party. And it has been uniformly held under this statute, that although in allowing the appeal the trial judge fixed the time for filing the bond, not less than 20 days, yet the operation of the

judgment was not stayed until the bond was filed. Holmes v. City of Chicago, 205 Ill. 536; McIntosh v. Glos, 304 Ill. 620.

In the McIntosh case the court said: "The operation of the final decree of September 23 was not stayed or superseded by the prayer for an appeal or the order granting the prayer and fixing the time for filing an appeal bond. The filing and approval of an appeal bond within the time fixed by the order was essential to stay the decree and transfer the cause, and it would remain in full force and effect until the bond should be filed and approved."

If the construction we have placed on Section 82 seems to be harsh, the remedy is with the legislature.

Counsel for defendants says there is no liability even though the court's action was erroneous, for the reason that the sheriff, in carrying out the mandate of the Superior court, acted as a ministerial officer. In support of this counsel cites Barnes v. Barber, 6 Ill. (1 Gilman) 401, and other authorities and quotes as follows from the Barnes case: "a ministerial officer is protected in the execution of the process of a Court of limited jurisdiction, where it shows upon its face that the Court had jurisdiction of the subject matter, and nothing appears to apprise him that the Court had not also jurisdiction of the person of the defendant. That principle has since been uniformly recognized by the Courts of that State, [New York] and furnishes, I think, the only reasonable and safe rule on the subject. It is the policy of the law as well to encourage as to protect its officers, in the faithful and efficient discharge of their official duties. Prosecutions against them for acts done by them in the bona fide performance of such duties, should therefore find no favor in Courts of justice, although for any neglect of duty or abuse of power, they should be held to a strict accountability."

In Leachman v. Dougherty, 81 Ill. 324, opinion by Mr. Justice Scholfeld, the court cited the Barnes case and other authorities, and said: "It was held in New York, in Webber et al. v. Gray, 24 Wend. 485, and The People v. Warren, 5 Hill, 440, that a ministerial officer is

Judgment was not stayed until the bond was filed. Chicago, 308 Ill. 588; Commonwealth v. Allen, 304 Ill. 500.

In the Chicago case the court said: "The order of the court decree of September 28 was not stayed or superseded by the order for an appeal or the order granting the stay and fixing the time for filing an appeal bond. The filing and approval of an appeal bond within the time fixed by the order was essential to stay the decree and transfer the cause, and it would remain in full force and effect until the bond should be filed and approved."

If the constitution we have placed on section 63 seems to be

harsh, the remedy is with the legislature.

Counsel for defendant says there is no liability, even though the

court's action was erroneous, for the reason that the court, in carrying out the mandate of the supreme court, acted as a ministerial officer. In support of this counsel cites Barnes v. Warren, 5 Ill.

(1 Gilman) 401, and other authorities and quotes as follows from the

Barnes case: "A ministerial officer is protected in the execution of the process of a court of limited jurisdiction, where it issues upon its face that the court had jurisdiction of the subject matter, and nothing appears to surprise him that the court had not the jurisdiction of the

person of the defendant. That principle has since been uniformly

recognized by the courts of that State, (New York) and elsewhere, I

think, the only reasonable and safe rule on the subject. It is the policy of the law as well to encourage as to protect the officers, in

the faithful and efficient discharge of their official duties.

Prosecutions against them for acts done by them in the bona fide performance of such duties, should therefore find no favor in courts of justice, although for any neglect of duty or abuse of power, they

should be held to a strict accountability."

In Leachman v. Dowd, 81 Ill. 324, opinion by Mr. Justice

Scholfeld, the court cited the Barnes case and other authorities, and

said: "It was held in New York, in Webster et al. v. Gray, 24 Barb. 488,

and The People v. Warren, 5 Hill, 440, that a ministerial officer is

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protected in the execution of process regular on its face, though he has knowledge of facts rendering it void. But the opposite doctrine is intimated in 16 Wendell, 518, in the opinion there given by Chancellor WALWORTH, and is expressly ruled in Green v. Mitchell, 31 Wis. 545, and such is the tendency of the decisions of this court. Guyer v. Andrews, 11 Ill. 494; Barnes v. Barber et al. 1 Gilm. 406; McDonald v. Wilkie, 13 Ill. 25; Hill v. Figley, 25 Ill. 156.

"In the present case, appellant not only had notice that the tax was extended by the clerk, in the absence of a levy made conformably to law, but he was an actor in inducing the extension of the tax, and, upon that ground alone, is liable for the injuries resulting. McPride v. City of Chicago, 22 Ill. 576."

In the Leachman case the commissioners of highways of the town made a signed statement showing that they needed to raise \$1,200 by taxes for road and bridge purposes. This statement was delivered to the town collector but he neglected to deliver it to the town supervisor or to cause it to be laid before the board of supervisors and no such statement was presented to the board of supervisors. But afterward the collector made a certificate signed by himself as town clerk, in which he stated that the commissioners of highways had assessed \$1,200 on the real property of the town to defray the cost of highway and bridge expenses. Afterward the county clerk proceeded to extend this amount to be collected and a warrant was annexed and delivered to the town collector. It was held that the collector was not protected in the execution of the warrant and his knowledge of the facts rendered the levy void.

It is alleged in the statement of claim that the deputy sheriff was advised by Greene that a notice of appeal would be served and that the deputy said the money would not be paid until plaintiff was notified, and these allegations are admitted on this record. Under the law announced in the Barnes case, "Prosecutions against them for acts done by them in the bona fide performance of such duties, should therefore find no favor in Courts of justice, although for any neglect of duty

7.

or abuse of power, they should be held to a strict accountability." And in the Leachman case, 81 Ill. 324, from which we have above quoted, this same rule of law is again announced.

Under all the facts as alleged in the statement of claim, we think the sheriff was not justified in paying over the money.

The judgment of the Municipal court of Chicago is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED.

McSurely, J., concurs.

Matchett, P. J., specially concurring:

I concur in the above and for the further reason that the court was wholly without jurisdiction to enter the order the sheriff obeyed so speedily.

or abuse of power, that should be held to be a violation of law.
and in the Leachman case, 61 Ill. 2d, 300 Ill. 2d, 300 Ill. 2d, 300 Ill. 2d,
quoted, this same rule of law is applied to the case.
Under all the facts as stated in the statement of claim, to
think the sheriff was not justified in paying over the money.
The judgment of the principal court of Illinois is reversed,
and the cause remanded for further proceedings in accordance with the
views herein expressed.

Respectfully, J. J. Conover.

Ketchett, P. J., specially concurring.

I concur in the above and for the reasons stated in the
court was wholly without justification to set aside the bill
operated so rapidly.

42411

KATHERINE B. COMSTOCK, et al.,

v.

MORGAN PARK TRUST AND SAVINGS BANK, et al.,

LINNY SCHULZE, for use of B. J. SCHWOEFFERMANN,
Receiver in the case of Katherine B. Comstock,
et al. v. Morgan Park Trust & Savings Bank,
for the use of B. H. Molner,

Appellee,

v.

BEVERLY STATE SAVINGS BANK, Garnishee,
Garnishee, Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

319 I.A. 253'

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Beverly State Savings Bank
By this appeal the ~~Morgan Park Trust and Savings Bank~~, garnishee,
seeks to reverse a judgment of \$1,176.24 entered against it as
garnishee.

The record discloses that March 4, 1935, a decree was entered in a representative suit brought by some of the creditors of the Morgan Park Trust and Savings Bank, (to enforce the stockholders liability) finding the amounts due from the several stockholders and decreeing that payment be made to the receiver appointed in that case. An appeal was taken directly to the Supreme court where upon consideration the cause was transferred to this court. (Comstock v. Morgan Park Trust and Savings Bank, 363 Ill. 341.) Afterward, November 2, 1936, we filed an opinion in the case affirming the decree. (Comstock v. Morgan Park Trust and Savings Bank, 287 Ill. App. 613, (abst.) The Supreme court granted leave to appeal and the judgment of this court was affirmed except as to an item for master's fees, Comstock v. Morgan Park Trust and Savings Bank, 367 Ill. 276.

By the decree Linny Schulze was found to be liable for \$6,000 and the receiver was authorized and directed to collect this amount, r

and the receiver was authorized and directed to collect this amount.

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together with the several amounts found to be due from other stockholders. The receiver was unable to collect the amount from Schulze and 4 others, and December 31, 1941, filed his verified petition in which he set UP that he was ready to file his final account; that he and his attorney had made a diligent effort to collect all the judgments against the stockholders and after exhausting all possible means there remained the amounts found due from the five stockholders including the \$6,000 which was decreed to be paid by Linny Schulze. The petition further set up that in order to facilitate the closing of the estate it was for the best interest that the receiver sell the judgments remaining unpaid on such terms and notice as the court might direct and prayed that an order be entered authorizing that this be done. On the same day an order was entered which recited that all parties in interest had been notified of the motion and it was ordered that the receiver be authorized and directed to solicit bids for the "following judgments: * * * Linny Schulze, \$6,000" and that the receiver be further authorized and directed to offer for sale at public auction "all of said judgments" to the highest and best bidder; that he first publish notice in the Chicago Daily Law Bulletin for a period of 3 weeks stating the time and place of the auction, namely January 20, 1942, at 10 a. m. in Room 742, County building and notice was so published. The publication by the receiver was made, the judgments sold and January 21, 1942, an order was entered approving the receiver's report of sale of the judgments to B. H. Molner for \$50 and the receiver was "authorized and directed to execute an assignment" of the judgments to Molner. On the next day, January 22, the receiver in accordance with the order of court, executed an assignment of the judgments including the one for \$6,000 against Linny Schulze to Molner. February 28, 1942, an execution was issued directing the Sheriff of Cook county to collect \$6,000 and it was noted on the execution that the judgment had been assigned to Molner. On the same day the execution was returned in which the sheriff stated

that "The within named defendant not found and no property of the within named defendant found in my county on which to levy this writ." February 28, 1942, Molner filed an affidavit for garnishment which set up that he was the owner of the judgment of \$6,000 against Linny Schulze, the return of the execution "No property found" but that the affiant Molner had reason to believe that the Beverly State Savings Bank was indebted to Schulze or had effects belonging to him. A copy of the assignment of the judgment by the receiver to Molner was attached to the affidavit for garnishment. The writ was served on the garnishee bank, interrogatories were filed which the bank answered one of which answers was as follows: "At the date of the service of the garnishment summons in the above entitled case and at this date the sum of \$1,176.24 is on deposit with the undersigned garnishee in a joint account in the names of L. C. Schulze or Mildred S. Weist, 2254 West 113th Street, Chicago, Illinois." The garnishee, the Beverly State Savings Bank, filed objections to the jurisdiction of the court and moved that it be discharged. The motion was denied and it was ordered that its answers to the interrogatories stand as its answer to the garnishment writ. Judgment was entered against the garnishee on its answer for the amount it had admitted in its answer as above stated, \$1,176.24, and the garnishee appeals.

The garnishee contends there was no valid judgment in the stockholders' liability case; that the decree should have run in favor of the creditors of the bank; that it was their judgment and not that of the receiver appointed in the case and that there was no execution issued in favor of the creditors but the only execution ran in favor of the receiver; that the judgment or decree finding the amounts due against the stockholders is void and can be attacked in this proceeding. We think there is no merit in these contentions. Suit was brought by the creditors of the bank, a receiver was appointed to collect the amounts due from the several stockholders which amounts were decreed and specifically set forth and to disburse the money collected.

that the within named defendant found in my account on 1/1/1934
writ." February 18, 1934, after which the judgment was
which set up that he was the owner of the judgment
Lenny Schultz, the return of his account in my name
that the within named defendant found in my account on 1/1/1934
Savings Bank was indebted to Schultz on the within named account
A copy of the assignment of the judgment by the plaintiff
was attached to the affidavit for garnishment. The affidavit
on the garnishment bank, interrogatories for which were
answered one of which was as follows: "The defendant
service of the garnishment was made in my name on 1/1/1934
this date the sum of \$1,175.24 was paid to the plaintiff
garnished in a joint account in my name and the name of the
Beverly State Savings Bank, which was paid to the plaintiff
the Beverly State Savings Bank, which was paid to the plaintiff
at the court and moved that it be given back. The plaintiff
and it was ordered that the answer to the interrogatories be
answer to the garnishment writ. The defendant was ordered to
garnishes on its answer for the amount of \$1,175.24 and the
as above stated, \$1,175.24, and the plaintiff was ordered
The garnish is considered as a valid lien in the
stockholders' liability order; that the defendant was ordered to
of the creditors of the bank; that it be paid to the plaintiff
of the receiver collected in the case and the sum of \$1,175.24
issued in favor of the creditors of the bank; that the sum of \$1,175.24
of the receiver; that the sum of \$1,175.24 be paid to the plaintiff
against the stockholders as a lien in favor of the plaintiff
proceeding, as a lien there is no lien in favor of the plaintiff
brought by the creditors of the bank, a receiver was appointed
collect the amounts due from the stockholders and the plaintiff
decreed and specifically set forth that the plaintiff was ordered

4.

That was his duty and no complaint was made that he did not follow the directions of the court.

As stated above, the case has been in the Supreme court twice and in this court, and it is a late day to question the validity of the decree, although of course this might be done if it were void. We hold it was valid. Liabilities similar to that decreed against Schulze have been upheld in numerous bank cases by the trial and Appellate courts and the Supreme court of this state over a period of years.

We are also of opinion that the issuance of the writ of execution and its return, and the sale of the judgment and assignment of it, were all valid and binding and certainly cannot be questioned in this collateral proceeding.

The garnishee further contends that since the decree was entered March 4, 1935, finding Schulze liable for \$6,000 and which decree or judgment was never revived, the lien of the judgment ceased; that no execution could issue thereon after March 4, 1942, and since the judgment in the instant case was entered June 4, 1942, it is reversibly erroneous. We think there is no merit to this contention. The garnishee proceedings were commenced February 28, 1942, and the summons served upon the garnishee on the same day, which was before the expiration of the seven years. In these circumstances there is no merit in the garnishee's contention.

But counsel for the garnishee say that the judgment cannot stand because the only matter before the court was the answer of the garnishee which stated there was \$1,176.24 on deposit in this bank "in a joint account in the names of L. C. Schulze or Mildred S. Weist, 2254 West 113th Street, Chicago, Illinois," and that Weist was not notified. That such joint account is not subject to garnishment where the judgment is against but one of the parties in

That was his duty and no complaint was made that it was not.

the direction of the court.

As stated above, the case has been in the court since 1914 and

in this court, and it is a late day to question the validity of the decree, although of course this might be done if it were valid. We hold it was valid. Liability is similar to that accorded against

Schulze have been upheld in numerous bank cases by the trial and Appellate courts and the Supreme Court of this state over a period of years.

We are also of opinion that the issuance of the writ of execution and its return, and the sale of the judgment and no payment of it, were all valid and binding and certainly not to be questioned in this collateral proceeding.

The garnishee further contends that since the decree was entered March 4, 1936, finding Schulze liable for \$2,000 and which decree or judgment was never revived, the lien of the judgment ceased; that no execution could issue thereon after March 4, 1936, and since the judgment in the instant case was entered June 4, 1936, it is reversibly erroneous. We think there is no merit to this contention. The garnishee proceedings were commenced January 28, 1936, and the summons served upon the garnishee on the same day, which was before the expiration of the seven years. In these circumstances there is no merit in the garnishee's contention.

But counsel for the garnishee say that the judgment cannot stand because the only matter before the court was the answer of the garnishee which stated there was \$1,178.84 on deposit in this bank "in a joint account in the names of A. J. Schulze or his wife, and in a joint account in the names of A. J. Schulze or his wife, 2354 West 113th Street, Chicago, Illinois," and that the account was not notified. That such joint account is not subject to garnishment where the judgment is against but one of the parties in

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whose name the joint account stands. In support of this counsel cite and discuss Brown v. Ist National Bank, 271 Ill. App. 424; Hackman v. Platt, Appellate Court 1st Dist., #40274, 298 Ill. App. 626 (abst.); Nudleman v. Stern, 315 Ill. App. 215 (abst.) No answer has been made to this contention, nor is any reference made to this omission by counsel for the garnishee in their reply brief.

In the Brown case [271 Ill. App. 424] the receiver of a bank had a judgment against Robert H. Brown, an execution was returned unsatisfied and garnishment proceedings were brought against the First National Bank of Chicago. After hearing, the garnishee was discharged and the receiver appealed. The account in the First National Bank was in the name of "R. H. or Rose Brown." We affirmed the judgment and held that money in a joint account could not be garnisheed for an unpaid judgment against one of them. What we said in that case was approved in the Hackman case by the Second Division of this court.

It was also error to proceed to dispose of the case without notice to Weist. Nudleman v. Stern, 315 Ill. App. 215.

For the reasons stated, the judgment of the Circuit court of Cook county against the garnishee is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McSurely, J., concur.

SECRET

42424

JAMES J. WALSH, et al.,
Appellees,

v.

THOMAS G. WALSH,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 253

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

This was a suit for partition of certain real estate between the father and three sons and upon the death of the father, his administrator by way of counterclaim, sought an accounting from defendant, one of the sons. Defendant filed his answer to plaintiffs' amended and supplemental complaint in which, among other things, he alleged that he believed there was certain personal property located on the premises in which he had an interest, "and, in the event that the safety of such property should be endangered, then, as far as his authority permits, he believes that a receiver should be appointed" to take charge of the property, collect rents, etc. The father having died, his administrator, Edwin Walsh, filed a counterclaim against defendant, Thomas G. Walsh, and prayed that an account be taken of the dealings and transactions of defendant in connection with the property, their rights fully adjusted and defendant be required to pay any sum found to be due. On the next day an order was entered giving defendant leave to file instanter his motion to strike the amended and supplemental complaint. Afterward defendant filed his petition in which he averred that he was the owner of an undivided one-third interest in the premises sought to be partitioned; that he was a physician and surgeon and for some time was a "Lieutenant-Commander in the United States Naval Reserve on active duty at the Norfolk Naval Hospital and under

JAMES J. WALSH, et al.,
Appellants,

v.

THOMAS G. WALSH,
Appellee.

SUPERIOR COURT,

312 11 1936

MR. JUSTICE O'BRIEN delivered the following opinion:

This was a suit for partition of certain real estate between the father and three sons and upon the death of the father, his administrator by way of executor, against his widow to establish defendant, one of the sons. Defendant filed his answer to plaintiff's amended and supplemental complaint in which, among other things, he alleged that he believed there was certain personal property located on the premises in which he had an interest, "and, in the event that the safety of such property could be endangered, then, as far as his authority permits, he believes that a receiver should be appointed" to take charge of the property, collect rents, etc. The father having died, his administrator, John Walsh, filed a counterclaim against defendant, Thomas G. Walsh, and prayed that an account be taken of the dealings and transactions of defendant in connection with the property, their rights fully adjusted and defendant be required to pay any and found to be due. On the next day an order was entered giving defendant leave to file his motion to strike the amended and supplemental complaint.

Afterward defendant filed his petition in which he averred that he was the owner of an undivided one-third interest in the premises sought to be partitioned; that he was a physician and surgeon and for some time was a "Lieutenant-Colonel" in the United States Army Reserve on active duty at the Norfolk Naval Hospital and under

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detached duty from said hospital." The prayer was that the action be suspended for the duration of the present national emergency in accordance with the Soldiers and Sailors Relief Act passed by the Federal Congress.

May 12, 1942, the court entered an order in which it is recited that on motion of attorney for plaintiffs, the motion of defendant to stay the proceeding, and upon the motion of defendant "to strike the Supplemental and Amended Complaint for Partition, and upon the motion of said defendant to strike the Counter-claim of Edwin Walsh, Administrator, heretofore filed herein, be, and each of said motions, is hereby denied." And it was further ordered that defendant answer the amended and supplemental petition and counterclaim within 25 days. It is from this order that defendant appeals.

After the record was filed in this court and before the abstract or defendant's brief was filed, plaintiffs moved to dismiss the appeal on the ground that the order of May 12, was not a final or appealable order. The motion was reserved to the hearing.

Counsel for defendant in their objections to the motion said "That part of the order directed to the Soldiers and Sailors Act being not final in itself, will not be further pleaded herein or objection thereto raised in this Court by the Appellant."

Section 77 of the Civil Practice Act, (Ill. Rev. Stat. 1941, chap. 110, par. 201) provides that "Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders or decrees of the Circuit Court, the Superior Court of Cook County" etc.

The order of May 12, overruling defendant's motion to strike the supplemental and amended complaint and the counterclaim, and ordering defendant to answer was in effect the same as overruling

detached duty from said assignment. The Court has held that the action be suspended for the duration of the present military emergency in accordance with the spirit and intent of the act passed by the Federal Congress.

May 12, 1942, the court entered an order in which it is recited that on motion of a party for dismissal, the action of defendant to stay the proceedings, and upon the motion of defendant to strike the supplemental and Amended Complaint for violation, upon the motion of said defendant to strike the counterclaim of Twin Walsh, Administrator, Association of American Physicians and Surgeons, is hereby denied. It is further ordered that defendant answer the amended and supplemented petition and counterclaim within 30 days. It is further ordered that defendant appeal.

After the record was filed in this court and before the abstract of defendant's brief was filed, plaintiff moved to dismiss the appeal on the ground that the order of May 12, was not a final or appealable order. The motion was referred to the hearing.

Counsel for defendant in their petition to the action said "That part of the order directed to the effect that the appeal being not final in itself, will not be a ground for dismissal or objection thereto raised in this court by the appellant."

Section 77 of the Civil Practice Act (11, No. 1, 1937, 1941, chap. 110, par. 201) provides that "where the law is so that Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgment, order or decree of the Circuit Court, the Appellate Court or Court of Appeals, the order of May 12, overruling defendant's motion to strike the supplemental and amended complaint and the counterclaim, and ordering defendant to answer was in effect the same as overruling

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a demurrer and obviously is not a final or appealable order.

Chicago Portrait Co. v. Crayon Co., 217 Ill. 200; The Cat Tail
Drainage Dist. v. Johnson Creek Dist., 275 Ill. 191.

Plaintiffs' motion to dismiss the appeal is sustained and
the appeal dismissed.

APPEAL DISMISSED.

Matchett, P. J., and McSurely, J., concur

a demurrer and conclusively is not a final or appealable order.
Chicago Portrait Co. v. Grayson Co., 17 Ill. App. 3d 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Plaintiff's motion to dismiss the appeal is denied.

The appeal dismissed.

NOTED FOR ENTRY.

WATSON, J., and ROBERTSON, J., concur.

42431

GREGORY NAHAY, and HELEN NAHAY,
otherwise known as Gregory Nahaj
and Helen Nahaj,

Appellees,

v.

PAUL MALAWKA, JAMES BUSLOW and
NORWEGIAN OLD PEOPLES HOME, a
Corporation,

Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

315 I.A. 234

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 20, 1942, plaintiffs filed suit in the nature of a creditor's bill by which they sought to have a judgment of \$840.13 which plaintiffs secured against defendant, Paul Malawks, in the Municipal court of Chicago, made a lien on a piece of real estate known as 1224 Fry street, Chicago. There was a hearing before the court and a finding and judgment in plaintiffs' favor against defendants Paul Malawka and James Buslow, and in favor of the other defendant, the Norwegian Old Peoples Home, a corporation, and Malawka and Buslow appeal.

The record discloses that June 27, 1939, the Norwegian Old Peoples Home entered into a written contract with Malawka to sell him a piece of real estate known as 1224 Fry street, for \$3,000, \$500 cash and the balance in monthly payments. There was a rider on the contract signed by plaintiffs, Gregory Nahay and Helen Nahay, his wife, whereby it was recited they guaranteed the carrying out of the contract by Malawka. Plaintiffs claimed that they were to buy the property with Malawka, each to have an undivided one-half interest in it, and the evidence shows that July 10, 1938, plaintiffs moved into one of the apartments of the building which was a two-apartment building. Two months afterward Malawka moved into the building. The evidence further shows that Malawka and

GREGORY NAHAY, and HELEN NAHAY,
otherwise known as Gregory Nahay,
and Helen Nahay,
Appellees,

PAUL MALAWKA, JAMES BUSLOW and
NORWEGIAN OLD PEOPLE HOME, a
Corporation,
Appellants.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

April 20, 1942, plaintiffs filed suit in the nature of a creditor's bill by which they sought to have a judgment of \$340.13 which plaintiffs secured against defendant, Paul Malawka, in the Municipal Court of Chicago, made a lien on a piece of real estate known as 1224 Fry Street, Chicago. There was a hearing before the court and a finding and judgment in plaintiffs' favor against defendants Paul Malawka and James Buslow, and in favor of the other defendant, the Norwegian Old People Home, a corporation, and Malawka and Buslow appeal.

The record discloses that June 27, 1938, the Norwegian Old People Home entered into a written contract with Malawka to sell him a piece of real estate known as 1224 Fry Street, for \$3,000, \$500 cash and the balance in monthly payments. There was a rider on the contract signed by plaintiffs, Gregory Nahay and Helen Nahay, his wife, whereby it was recited they guaranteed the continuing out of the contract by Malawka. Plaintiffs claimed that they were to buy the property with Malawka, each to have an undivided one-half interest in it, and the evidence shows that July 10, 1938, plaintiffs moved into one of the apartments of the building which was a two-apartment building. Two months afterward Malawka moved into the building. The evidence further shows that Malawka and

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defendant Buslow were very good friends of long standing and there is evidence to the effect that Buslow knew that plaintiffs were supposed to have an undivided one-half interest in the property.

Plaintiff, Mrs. Nahay, testified she and her husband spoke to Malawka and said there was a nice piece of property which they were going to buy, located on Fry street, and Malawka said he would go in with them and they would buy it on a fifty-fifty basis. Albert Peterson, an attorney who prepared the contract and in whose office it was signed, was the president of the Norwegian Old Peoples Home; he was called by plaintiffs under §60, of the Civil Practice Act, and testified that Mr. and Mrs. Nahay and Mr. Malawka came to see him at his office. "There was a conversation concerning the property at 1224 Fry Street, which they wanted to buy." The terms were talked about and he drew up the contract. There was something said about Mr. Nahay having obtained a divorce from his first wife and some question of alimony was involved. The witness further testified: "The contract was drawn at the instance of the Nahays and Malawka." And in response to a question put to him by the court as to whether he understood the parties were buying on a fifty-fifty basis he replied: "No, I didn't understand it that way. I didn't speak their language. They talked between themselves."

Mrs. Nahay testified that she saw defendant Buslow with Malawka at the building and that she heard Malawka tell Buslow: "I buy this house, this property with Gregory Nahay and Mrs. Nahay, fifty-fifty. I have got a half interest,"

The evidence further shows that after defendant Malawka moved into the property he brought an action against plaintiffs in the Municipal court and had them ousted from the building. Afterward they brought suit against him in the Municipal court, apparently on account of the money they had put into the property and secured the judgment for \$840.13. After Malawka was served with summons in that case, defendant Malawka gave a quit claim deed to the premises to defendant Buslow. Before the suit was started by the Nahays in the Municipal court against Malawka, plaintiff Helen Nahay,

defendant Bhalow were very good friends of long standing and there is evidence to the effect that Bhalow knew that plaintiff was supposed to have an undivided one-half interest in the property. Plaintiff, Mrs. Mahay, testified she and her husband spoke to Malawka and said there was a nice piece of property which they were going to buy, located on my street, and Malawka said he would go in with them and they would buy it on a fifty-fifty basis. Albert Peterson, an attorney who prepared the contract and in whose office it was signed, was the president of the Norwegian Old People Home; he was called by plaintiff under §80, of the Civil Practice Act, and testified that Mr. and Mrs. Malawka came to see him at his office. "There was a conversation concerning the property at 1234 My Street, which they wanted to buy." The terms were talked about and he drew up the contract. There was something said about Mr. Mahay having obtained a divorce from his first wife and some question of alimony was involved. The witness further testified: "The contract was drawn at the instance of the Mahays and Malawka." And in response to a question put to him by the court as to whether he understood the parties were buying on a fifty-fifty basis he replied: "No, I didn't understand it that way. I didn't speak their language. They talked between themselves."

Mrs. Mahay testified that she saw defendant Bhalow with Malawka at the building and that she heard Malawka tell Bhalow: "I buy this house, this property with Dr. Gory Mahay and Mrs. Mahay, fifty-fifty. I have got a half interest."

The evidence further shows that after defendant Malawka moved into the property he brought an action against plaintiff in the Municipal court and had them ousted from the building. Afterwards they brought suit against him in the Municipal court, successfully on account of the money they had put into the property and secured the judgment for \$840.12. After Malawka was served with summons in that case, defendant Malawka gave a quit claim deed to the premises to defendant Bhalow. Before the suit was started by the Mahays in the Municipal court against Malawka, Plaintiff Nelson Mahay,

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December 7, 1938, filed an affidavit in the Recorder's Office of Cook county, in which she swore that she had a half interest in the property in question and that she is filing the affidavit for the purpose of advising parties of her half interest in the premises.

After plaintiffs had obtained the judgment against Malawka for \$840.13, the Norwegian Old Peoples Home conveyed the property by warranty deed dated February 2, 1942, to defendant Buslow. There is considerable other evidence in the record which we think unnecessary to mention here.

The court in its decree found that the conveyance by Malawka to Buslow by quit claim deed dated June 26, 1939, was fraudulent and known to be so by these two defendants and that the conveyance was made for the purpose and with the intention of depriving plaintiffs of the satisfaction of their judgment against Buslow in the Municipal court.

We have considered all the evidence in the record and argument of counsel and are of opinion that the finding of the chancellor, who saw and heard the witnesses testify, is not against the manifest weight of the evidence. In these circumstances we are not warranted under the law in disturbing the decree.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

December 7, 1938, filed an affidavit in the Recorder's Office of Cook County, in which she swore that she had a half interest in the property in question and that she is William Lee's affidavit for the purpose of advising parties of her half interest in the premises. After plaintiff had obtained the judgment against defendant for \$240.15, the Norwegian Old People Home Corp., and the property by warranty deed dated February 2, 1942, to defendant herein. There is considerable other evidence in the record which we think unnecessary to mention here.

The court in its decree found that the conveyance by William Lee to Buelow by quit claim deed dated June 28, 1938, was fraudulent and known to be so by these two defendants and that the conveyance was made for the purpose and with the intention of depriving plaintiff of the satisfaction of their judgment against Buelow in the Municipal Court.

We have considered all the evidence in the record and argument of counsel and are of opinion that the finding of the chancellor, who saw and heard the witnesses testify, is not against the manifest weight of the evidence. In these circumstances we are not warranted under the law in disturbing the decree.

The decree of the Circuit Court of Cook County is affirmed.

DECEMBER 1, 1942.

Wheatst, P. J., and McGraw, J., concur.

42452

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. FRED W. GOODLOE,
Appellant,

v.

JAMES P. ALLMAN, Commissioner of
Police, et al.,
Appellees.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

319 I.A. 234²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

March 7, 1942, Fred W. Goodloe filed his petition praying that a writ of mandamus issue to compel his restoration to the position of police patrolman under the classified civil service of the Police Department of the City of Chicago. Defendants filed their motion to strike the petition and to dismiss the action, the motion was sustained, the petition stricken, plaintiff elected to stand by his petition, the suit was dismissed and he appeals.

The material allegations of the petition are that plaintiff successfully passed an examination August 8, 1919, and was certified June 7, 1922, as a patrolman in the classified service in the Police Department of Chicago; that he faithfully performed his duty until his suspension December 12, 1941, and that he was illegally removed January 14, 1942, as a result of being tried on certain charges filed against him before the Civil Service Commission. That one of the charges was that December 11, 1941, he was intoxicated while on duty; that he staggered when he walked and was incoherent in his speech, etc. It was further alleged that January 14, 1942, plaintiff was tried before the Civil Service Commission "by and through a so-called Trial Board of said Commission;" that the Commission took the charges under advisement, he was found guilty and an order was entered discharging him from the police force.

Plaintiff alleged he was not intoxicated as charged nor was he

REPLY OF THE DEFENDANT
TO THE PETITION OF THE
PLAINTIFF FOR WRIT OF HABEAS
CORPUS
JAMES T. ALLEN, JR.,
Police, et al.,
Respondents.

March 7, 1942, James T. Allen, Jr., Police, et al.,
that a writ of habeas corpus should be granted to the
position of Police Officer, et al., in the City of
the Police Department of the City of Chicago, et al.,
their motion to a writ of habeas corpus and to the
motion was sustained, the Police Officer, et al.,
stand by his petition, et al., et al.,
The material allegations of the petition are as follows:
successfully passed an examination August 8, 1941, and was
June 7, 1942, as a policeman in the Chicago Police
Department of Chicago; that he is a citizen of the State of
Illinois, and that he was lawfully employed as a
January 14, 1942, as a policeman in the Chicago Police
against him before the Civil Service Commission, et al.,
charges was that December 17, 1941, he was arrested on the
that he appeared when he was arrested on the 17th of
It was further alleged that on May 14, 1942, he was
before the Civil Service Commission, et al., et al.,
Board of said Commission, et al., et al.,
advisement, he was found guilty and an order was issued
him from the Police force.
Plaintiff alleged he was not intoxicated at the time he was

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guilty of any of the other charges made against him; that upon the hearing of the charges plaintiff objected that the charges and specifications were too general and did not comply with the statute or rules of the Commission in that they did not sufficiently inform him as to the charges made against him. That there was not "sufficient testimony in the record" taken before the Commission to warrant the finding that he was guilty of intoxication, as charged; that "the Civil Service Commission before which he was tried, was and is illegally constituted *** in that the act, among other things, provides that 'not more than two members shall, at the time of the appointment, be members of the same political party,'" and that one of the commissioners, Wendell E. Green, was alleged to be a Republican at the time of his appointment, October 23, 1935, "as a member of the minority party" but that he "is not a Republican or member of any other party save the Democratic Party." And that the other two members of the Commission were Democrats.

Attached to and made a part of the petition are the proceedings had before the Civil Service Commission, one of which was the motion of Goodloe made before the Commission to quash the charges filed against him because they did not sufficiently inform him of the charges upon which he was about to be tried. In this motion no matter is set up that the Commission was not properly constituted for the reason that Commissioner Green was a Democrat and not a Republican. Also attached to the petition is the testimony given before the Commission which shows that a number of witnesses were sworn and examined. Then follows an exhibit which is an affidavit by Goodloe's attorney in which the attorney swears he has examined the records of the Election Commissioners of the precinct in which Green resided and that they fail to show that Green was a registered voter or that he voted at the Primary Election of 1940. The affidavit continues that Green has become a member of the Democratic Party. Another exhibit attached to the petition as an exhibit shows Goodloe moved to vacate the order discharging him, entered January 14, 1942, by the Commission because

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Commissioner Green had become a Democrat. This motion is sworn to February 14, 1942.

Then follow what purport to be other lengthy proceedings - papers filed and orders entered by the Civil Service Commission. Defendants' motion to strike the petition in the instant case was quite lengthy and divided into 22 paragraphs, but we think it not important to mention them here.

Plaintiff's theory of the case, as stated by his counsel, is that he had a clear legal right to have a writ of mandamus issue "because the Civil Service Commission which removed him was unlawfully constituted and not operated in accordance with civil service statute at the time of the plaintiff's trial." And his counsel say that Green was appointed October 23, 1935, a Commissioner as a Republican to fill the vacancy caused by the death of Albert O. Anderson, a Republican; that Green was re-appointed July 13, 1938, and remained without re-appointment until 1941. Counsel then contend that exhibits attached to the petition in the instant case show conclusively that Green participated in Democratic campaigns and that he stated he was a Democrat in submitting his candidacy for Associate Judge of the Municipal court, at the Primary Election February 5, 1942. Counsel say that these acts "show conclusively that he intended to, and did abandon all affiliation with, and interest in the Republican party, and definitely cast his lot with the fortunes of the Democratic party, and thereby became disqualified to serve as a minority member of the Civil Service Commission."

On the other side counsel for defendants in their brief say (1) "The Civil Service Commission was at least a de facto tribunal. The judgments of a de facto tribunal cannot be attacked collaterally" citing People ex rel Hicks v. Lycan et al., 314 Ill. 590 and other cases; (2) that plaintiff has failed to show a clear legal right to have the writ issued and (3) that the petition fails to show that the charges filed against him before the Civil Service Commission were insufficient to warrant his removal.

Commissioner Green had become a Democrat. This was in 1904.

to February 14, 1904.

Then follow were reports to be given by the various parties - the
 filed and orders entered by the civil service commission. Defendants
 motion to strike the petition in the instant case was denied. The
 and divided into 25 paragraphs, but we think it not important to
 mention them here.

Plaintiff's theory of the case, as stated by his counsel, is that
 he had a clear legal right to have a writ of mandamus issued against
 the Civil Service Commission which removed him and only after
 constituted and not operated in accordance with civil service law.
 at the time of the plaintiff's trial. The defendant's counsel
 Green was appointed October 23, 1903, a Democrat and was a Republican
 to fill the vacancy caused by the death of Albert W. Green, a
 Republican; that Green was re-appointed July 15, 1904, and remained
 without re-appointment until 1904. Counsel then contended that while
 attached to the petition in the instant case as a conclusively
 Green participated in Democratic campaign and that he was not
 Democrat in submitting his candidacy for associate judge of the
 Municipal Court, at the primary election February 3, 1904. Counsel
 that there was "now conclusively that he intended to, and did
 abandon all affiliation with, and interest in the Republican Party, and
 definitely cast his lot with the fortunes of the Democratic Party, and
 thereby became disqualified to serve as a minority member of the Civil
 Service Commission."

On the other side counsel for defendants in their brief set
 (1) "The Civil Service Commission was at first a facto tribunal.
 The judgments of a facto tribunal cannot be attacked collaterally
 citing People ex rel. Hicks v. Lyman et al., 214 Ill. 300, 301, 302, 303
 cases; (2) that plaintiff was held to show a clear legal right to
 have the writ issued and (3) that the petition failed to show that the
 charges filed against him before the Civil Service Commission
 were insufficient to warrant his removal.

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Section 1 of the Cities Civil Service Act, (Ill. Rev. Stat. 1941, chap. 24 1/2, par. 39, §1) provides that the mayor of each city which adopts the act shall appoint three persons who shall constitute and be known as the Civil Service Commissioners, and "Two Commissioners shall constitute a quorum." All appointments to the Commission, both original and to fill vacancies "shall be so made that not more than two members shall, at the time of appointment, be members of the same political party."

In the instant case it seems to be undisputed that the requirements of the act were complied with when the mayor appointed Green, a Republican, and Geary and Brennan, Democrats. And the fact that Green, February 14, 1942, a month after Goodloe was tried and discharged by the Commission filed an affidavit in which he stated that he was a qualified voter at a certain residence in Chicago and was a candidate for a nomination to the office of Associate Judge of the Municipal court of Chicago to be voted upon at the Primary Election to be held April 14, 1942, and requested his name be printed on the Official Democratic Primary Ballot, does not conclusively show that he had ceased to be a Republican and was then a Democrat, because it is common knowledge that for many years in Chicago and Cook county, Republicans and Democrats have all often run on one ticket or the other and no one thought that any of these was changing his party affiliations. The three Commissioners having been appointed as required by the statute above quoted, it cannot be said that in this collateral proceeding the appointment of Commissioner Green became illegal.

Nor are we able to agree with counsel for plaintiff that there is a "fundamental analogy in the case at bar and that of Ramsay v. Shelton, 329 Ill. 432." In that case a committee composed of physicians claimed to be authorized to conduct hearings in the matter of revoking licenses issued to persons to practice medicine. Shortly after such proceeding was brought the doctor whose license was sought to be revoked objected that the committee was not properly constituted.

In the instant case it seems to be

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to be revoked objected that the committee was not qualified to make such a determination. After each proceeding, the board has brought the doctor before it and after a hearing has issued its decision. The board has the right to revoke the license of a doctor who has been found guilty of a crime involving moral turpitude. The board has the right to revoke the license of a doctor who has been found guilty of a crime involving moral turpitude. The board has the right to revoke the license of a doctor who has been found guilty of a crime involving moral turpitude.

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He was overruled and thereupon he filed his bill to enjoin the hearing before the committee. The Supreme court held that the members of the committee did not have the qualifications required by the statute and the committee was enjoined from proceeding further. In the instant case, plaintiff did not object before the Civil Service hearing that Green since his appointment had ceased to be a Republican, until after his trial and discharge. The attack in the Shelton case, was direct against the Committee as a body. Here the attack is collateral and against only one member of the Commission.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

He was overruled and thereupon he filed his bill to enjoin the hearing before the committee. The Supreme Court held that the statute and the committee was enjoined from proceeding further. In the instant case, plaintiff did not object before the trial judge to the hearing that Green since his appointment had ceased to be a Republican, until after his trial and acquittal. The attack in the Shelton case, was directed against the committee and not the hearing. There the attack is collateral and against only one member of the committee. The judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSweeney, J., concur.

MARION EWING,
Appellant,
v.
EDWIN C. EWING,
Appellee.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

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319 I.A. 255

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

October 8, 1941, plaintiff filed her complaint for separate maintenance alleging that defendant deserted her October 1, 1941; that she was living separate and apart from her husband without her fault and prayed for a decree of separate maintenance and the custody of their 7 1/2 year old daughter. Defendant filed his amended answer in which he admits most of the allegations in the complaint except that he denies plaintiff conducted herself as a good wife and he alleges that she is not the proper person to have the custody of the child. He denies the desertion charge and in his answer prays that the complaint be dismissed and that the care and custody of the child be awarded to him.

The hearing was commenced June 19, 1942, and a decree entered June 25. The court found the equities were with defendant, he was awarded the custody of the child but the mother was given the right to visit her at all reasonable times. It was further decreed that defendant pay plaintiff \$200 as additional attorney's fees. The prayer of the complaint for separate maintenance was denied for want of equity and plaintiff appeals.

In the decree the court found that the parties were married August 21, 1933, in Chicago; that one child was born as a result of the marriage who was then 8 years old; the parties separated October 1, 1941; that there was no desertion on the part of defendant; that

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plaintiff was not without fault in living separate and apart from defendant; that plaintiff "refuses to refrain from the practice of standing on street corners distributing the literature of the WATCH TOWER BIBLE & TRACT SOCIETY, commonly called 'JEHOVAH'S WITNESSES,' and refuses to refrain from calling at and ringing doorbells at uninvited homes, even though it is objectionable to her husband;" that defendant is entitled to the custody of Rosanne, their child, "as prayed for in the amended answer;" that the equities are with defendant.

Counsel for plaintiff after setting forth the pleadings and decree, say that "Since the entry of the decree the child has been in the custody of Mr. Ewing." They contend (1) that under the evidence plaintiff was entitled to a decree that she was living separate and apart from her husband without her fault and entitled to the care and custody of the child. And (2) that the court had no jurisdiction to award the custody of the child to defendant after the prayer of the complaint had been denied.

The record discloses that the parties were married in Chicago August 21, 1933, and resided together continuously until October 1, 1941, when they separated. That one child, a daughter, was born May 28, 1934; that the parties lived together without any quarrels until about April, 1941, when defendant complained that his wife was giving too much time to "ideologies of the Jehovah's Witnesses faith which he said Mrs. Ewing was teaching the daughter;" and that she was associating in church work with a Mr. McGuire who was one of the members of Jehovah's Witnesses. The evidence further tends to show that the mother was absent sometimes when the daughter came home from school. At that time Rosanne was going to St. Jerome's Catholic School where she had been for about 3 years. After the separation Rosanne went with her mother and the mother sent her to the Field Public School which was contrary to defendant's wishes.

Plaintiff testified that for 2 years and 3 months before the separation they lived in a 4 1/2 room apartment; that prior to

the separation there were a number of discussions between them relative to their separation, beginning in April, 1941; that the whole thing was on account of a religious question; that defendant said to her a number of times that he would send her to her mother's home in West Virginia and she did not want to leave and break up the home. A few days prior thereto he had written a letter to her mother in West Virginia. The letter is in evidence and in it defendant advises plaintiff's mother that the parties are selling the furniture because they have no common understanding or mutual friends and he says that "Marion feels she would like to take one of your apartments," and that he would pay the rent. And that in the end the matter might be extended a sufficient time "for honest charges of desertion or whatever else a lawyer requires."

The evidence further shows that defendant refused to rent an apartment but rented a separate room for plaintiff and the daughter and then went to live in a room which he rented for himself.

Plaintiff further testified that about 3 weeks after the separation which would be 2 weeks after the suit was filed, she took the child and called on defendant where he was living and waited there for him to come home. She told him she had come back and wanted to live with him and would he please take her back but that he refused to do so and that it had also been her desire to live together. The evidence shows that plaintiff distributed pamphlets and preached from her interpretation of the bible, She testified that she went out sometimes two or three times a week preaching the gospel of the Witnesses. When she finished her housework she would leave but would always get back to give the daughter lunch when she returned from school. Sometimes she would go out riding on a bicycle taking some of her pamphlets with her; at other times she would drive the automobile. Sometimes she picked up some of her assistants in her religious work, including McGuire, and took her daughter with her who also helped distribute literature on street corners, to which the father objected. One evening she had a slight automobile accident when McGuire was with her.

The separation there were a number of children in the family and I have to their separation, beginning in April, 1944; and the whole thing was on account of a religious question; that is, the father wanted to have a number of times that he would send her to her father's home in West Virginia and she did not want to leave and break up the home. A few days prior thereto he had written a letter to her father in West Virginia. The letter is in evidence and in it he stated that Plaintiff's mother that the parties are selling the furniture because they have no common understanding or mutual friends and he says that "Marion feels she would like to take one of your apartments" and that he would pay the rent. And that in the end the mother would be expected a sufficient time "for honest charges of education or what ever else a lawyer requires."

The evidence further shows that defendant returned to his apartment but rented a separate room for himself and the daughter and then went to live in a room which he rented for himself.

Plaintiff further testified that about 3 weeks after the separation which would be 2 weeks after the suit was filed, the father would and called on defendant where he was living and asked her to come home. He told him she had come back and wanted to live with him and would he please take her back but that he refused to do so and that it had also been her desire to live together. The evidence shows that Plaintiff distributed pamphlets and preached from her for a portion of the Bible. She testified that she went out on a number of times three times a week preaching the Gospel of the Gospels. When she finished her housework she would leave but would always get back to give the daughter lunch when she returned from school. Sometimes she would go out riding on a bicycle taking some of her pamphlets with her; at other times she would drive the automobile. Sometimes she picked up some of her assistance in her religious work, including McGuire, and took her daughter with her who also helped distribute literature on street corners, to which the father objected. One evening she had a slight automobile accident when McGuire was with her.

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In commenting on this evidence the court said: "A husband wouldn't be required to remain at home if a wife is with somebody else a number of times a week or a number of times a month." She further testified that her husband never objected that there was any wrongdoing in this respect because McGuire was a member of the same organization.

During the cross-examination of plaintiff she was called under §60 by counsel for defendant and testified that during the time she was separated from defendant she would see McGuire once in a while at Bible study and meetings; that they sometimes went to services. Once they went together to the Near North Side and walked down in Grant Park.

"Q. You also went up to see Mr. McGuire in the lock-up?" The objection to this question was sustained.

Defendant testified that his wife had a little basket on her bicycle that he thought was used for her to carry groceries but found out after they separated it was used to carry the Bible and other books she would distribute around on the street and that he found that his wife would probably put in about 4 hours a day at this work and had been doing so for approximately a year; that in the spring of 1941 he objected to her spending so much time in that way; that he had no objection to his wife having her own religious views; that in speaking of the automobile accident, above mentioned, he testified: "she did say that brother McGuire was riding with her at ten o'clock at night and I told her then that I objected to her being out at night with men or in the daytime or any other time. *** She didn't say she wouldn't discontinue." On other occasions McGuire had been appointed as her partner in her work. After that she went out with McGuire every Sunday and defendant asked her not to do so. That the daughter went out with them at times. That he was willing to take her back if she would not put in more than an hour's time a week at her church duties; that he objected to the child being taken into plaintiff's religious organization.

McGuire, called by defendant, testified that he had known plaintiff a couple of years; that they "worked together for some time as a team"

McGuire, called by defendant, testified that he had known Plaintiff for a couple of years; that they "worked together for some time as a team" taken into Plaintiff's religious organization.

time a week at her church duties; that he objected to Plaintiff being was willing to take her back if she would not put in more than an hour not to do so. That the daughter went out with men at times, but after that she went out with McGuire every day. Plaintiff had been other occasions McGuire had been Plaintiff's companion in her work or any other time. *** The didn't say she was Plaintiff's companion that I objected to her being out at night with men or in a position McGuire was riding with her at ten o'clock at night and it is her that accident, above mentioned, he testified: "She did say that Plaintiff wife having her own religious views; that in speaking of the Plaintiff's spending so much time in that way; that he had no objection to her for approximately a year; that in the spring of 1911 he suggested to her probably put in about 4 hours a day at this work and had been doing so distribute around on the street and that he found that his wife would they separated it was used to carry the Bible and other books and would that he thought was used for her to carry these things out from the house Defendant testified that his wife had said:

to this question was answered.

"Q. You also went up to see Mr. McGuire in the local hotel, the objection went together to the local hotel and walked down to the street with Bible study and meeting; that they sometimes went to a conference, and they separated from defendant and would see Plaintiff once in a while and \$50 by counsel for defendant and a bill for a similar bill for the During the cross-examination of Plaintiff he was asked what respect became McGuire was a member of the local church.

that her husband never objected that there was any reason for his belief of times a week or a number of times a month. That he was a married man he required to remain at home if his wife was away from him.

In commenting on this evidence the court said: "It is not necessary to be

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in one part of the city or another - sometimes together and sometimes separate; that she had her home and he had his and subsequent to the separation he had been to plaintiff's home a number of times "I would pick her up at her home. *** It has been quite often. Some weeks it might be two or three times a week, and sometimes I would not see her at all." That about a week before the trial he met plaintiff "at my lawyer's office." Then they went to the Federal Building, walked around the loop and around the park to get a little air "because we both had to go back and see our respective lawyers in the afternoon." That they went to the Eastgate Hotel and got a coke. That afterward "She went to my lawyer's office with me in the afternoon." That on the afternoon of June 12, plaintiff came to the Federal Building "where I was. *** She was on the other side of the partitions. We just talked through the grate." That they walked through Grant Park in the afternoon, apparently June 12; that they were downtown on business, "She had to see her lawyer and I had to see my lawyer."

Defendant further testified that he made no complaint that there was any wrongdoing between McGuire and plaintiff.

To entitle plaintiff to a decree for separate maintenance the record must show that she was living separate and apart from her husband without her fault. The court found she was not, and upon a consideration of all the evidence in the record we are unable to say that his finding was not warranted. In these circumstances the decree against her cannot be disturbed.

Counsel for plaintiff further say that the court had no jurisdiction to award the custody of the child to defendant after the prayer of the complaint had been denied. We think this contention must be sustained. Thomas v. Thomas, 250 Ill. 354; Smith v. Smith, 214 Ill. App. 302; Burke v. Burke, 307 Ill. App. 541 (abst.)

In the Burke case, in referring to the Thomas case we said it was held in that case that equity had no jurisdiction to decree the

in one part of the city on another - sometimes in the morning and sometimes in the afternoon; that she had her home and he had his home and they were separated; that she had been to plaintiff's home a number of times "I would pick her up at her home." *** It has been determined that she might be two or three times a week, and sometimes I would not see her at all. That about a week before the trial I had met plaintiff at my lawyer's office. Then they went to the Park Hotel, walked around the loop and around the park to get a little air "and then they went to go back and see our respective lawyers in the afternoon." That they went to the Westgate Hotel and got a copy. That afternoon they went to my lawyer's office with me in the afternoon. That on the afternoon of June 12, I invited them to the Westgate Hotel where I was. *** She was on the other side of the partition. He just talked through the grate. That they walked through the grate in the afternoon, apparently June 12; that they were down in the business, "she had to see her lawyer and I had to see my lawyer." Defendant further testified that he made no statement that there was any wrongdoing between himself and plaintiff. To entitle plaintiff to a decree for divorce, it is necessary that record must show that she was living separate and apart from her husband without her fault. The court found the evidence in this regard to be consideration of all the evidence in the record was not sufficient to say that his finding was not warranted. In these circumstances, a decree against her cannot be dissolved. Counsel for plaintiff further said that the court was in jurisdiction to award the custody of the child to the mother in the prayer of the complaint had been granted. In this case, the court must be sustained. Thomas v. Thomas, 200 Ill. 341, 131 Ill. App. 308; Smith v. Smith, 207 Ill. App. 341 (1913). In the Burtis case, in referring to the Thomas case, it was held in that case that equity had no jurisdiction to award

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custody and control of the children of the parties except as an incident to the divorce suit. This contention seems to be conceded by counsel for defendant. But the question has become moot because at the time of the entry of the decree the child was in the custody of the mother and that counsel for plaintiff, in their brief, say that since the entry of the decree the custody of the child has been with the father. And they say that in any event the finding in the decree should be stricken as surplusage and Bush v. Bush, 316 Ill. App. 295, is cited. We think the latter contention must be sustained and that part of the decree awarding the custody of the child is stricken and the decree modified accordingly.

The decree of the Superior court of Cook county is modified and affirmed as modified.

DECREE MODIFIED AND AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

custody and control of the children of the parties as an incident to the divorce suit. This contention seems to be borne out by the fact that the question has become a question of the custody of the children of the parties in the custody of the mother and that course I for plaintiff, in this case, I have taken the custody of the children of the parties in the custody of the mother. And they say that in any event the finding in the decree should be taken as evidence and Bush v. Bush, 218 Ill. 401, is cited. We think the latter contention may be sustained and that part of the decree awarding the custody of the child is a violation of the

modified accordingly.

The decree of the Superior Court of Cook County is affirmed and

affirmed as modified.

DECEMBER 11, 1911

Mathews, P. J., and Mathews, J., concur.

312 I.A. 236

GEN. NO. 9862

AGENDA NO. 15

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

FEBRUARY TERM, A.D. 1943

ROLLAND D. SPRAGUE,
APPELLEE,

vs.

GRANT THOMAS and
ELIZABETH THOMAS,
APPELLANTS.

APPEAL FROM THE CIRCUIT
COURT OF WINNEBAGO COUNTY.

HUFFMAN, P. J.

This is a habeas corpus proceeding by appellee to obtain custody of his eight year old daughter. Appellee married appellants' daughter. She died at the birth of the child, in June, 1934. Following her death, appellee and the child lived with appellants. Later appellee went to Independence, Missouri. There, he remarried in 1936. The child was visiting the father in Independence, in the summer of 1941, when it is alleged that on September 22nd, appellants, without the knowledge or consent of appellee, took possession of the child and returned with her to the

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city of Rockford. Subsequently, appellee came to Rockford, where he instituted this action for possession and custody of his child.

Appellee's financial condition appears to have always been very uncertain. However, he is now employed in a flour mill at sixty-five cents an hour. He states that he is an ordained minister in the Church of Christ, and engaged in preaching, but from this activity, it appears he receives no remuneration of a pecuniary character.

His present wife states that he provides a good home; has no bad habits; is industrious in the Church, and is regularly employed. She says that she has the time and is willing to assume the obligations of raising and caring for the child; that she has no employment outside the home; and that she will rear the child as her own.

The court awarded the child to appellee father. In doing so, he states he finds both appellants and appellee to be fit and proper persons, and that he has been governed entirely by what he considers to be the best interests of the child.

Nothing appears against appellee's character or moral fitness. The only thing to his discredit seems to be an inaptitude for gainful occupation in normal times. However, his economic troubles appear to have existed prior to the present policy of caring for those

city of Rockford. Subsequently, appellee came to Rockford, where he instituted this action for possession and custody of his child.

Appellee's financial condition appears to have always been very uncertain. However, he is now employed in a flour mill at Rockford, Ill. He states that he is an ordained minister in the United Methodist Church, and engaged in preaching, but even this activity, if appellee receives no remuneration of a pecuniary character.

His present wife states that he provides a good home; has no bad habits; is industrious and honest, and is regularly employed. She says that she has the time and is willing to assume the obligation of maintaining and caring for the child; that she has no employment outside the home; and that she will rear the child as her own.

The court awarded the child to appellee's father. In doing so, he states he finds both appellants and appellee to be fit and proper persons, and that he has been governed entirely by what he considers to be the best interests of the child.

Nothing appears against appellee's character or moral fitness. The only thing of his character seems to be an inaptitude for business occupation in normal times. However, his economic troubles appear to have existed prior to the present policy of caring for these

not disposed to cope with the vicissitudes of life.

Appellants are old and lonely. The child has been living with them for several years. They, no doubt, see in this young girl their own daughter who gave her life in exchange for her baby. This is a case where the answer to the last appeal of what is right, lies within a man's own breast.

The trial court was actuated by the best interests of the child. We find no cause to disturb the judgment.

Judgment affirmed.

not disposed to cope with the vicissitudes of life.
 Appellants are old and infirm. The child has
 been living with them for several years. They no
 doubt, see in this young girl their own daughter who
 gave her life in exchange for her baby. This is a
 case where the answer to the last appeal of what is
 right, lies within a man's own breast.
 The trial court was satisfied by the best interests
 of the child. We find no cause to disturb the judgment.
 Judgment affirmed.

Abstract

319 I.A. 256²

Gen. No. 9860.

Agenda No. 13.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
FEBRUARY TERM, A. D. 1943.

51/3
4-78 J

A. Y. McDONALD MANUFACTURING CO.,
a Corporation,

Plaintiff-Appellee,

vs.

303 HENDERSON CORPORATION,
Defendant-Appellant.

APPEAL FROM
CIRCUIT COURT,
STEPHENSON COUNTY.

WOLFE,-- J.

On September 4, 1941, the War Department of the United States Government solicited bids on 50 deep well pumping sets and requested the A. Y. McDonald Manufacturing Company to submit bids for the manufacture of said pumping sets. On September 9, 1941, one of the officers of the McDonald Manufacturing Company called upon Mr. Lee Madden, Vice-President of the Stover Manufacturing and Engine Company, the predecessor of the defendant corporation, and had a discussion with him relative to the Stover Company bidding on the engines for pumping outfits. By correspondence and telephone conversations,

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negotiations were carried on between the companies, and it is claimed by McDonald Manufacturing Company that a contract was entered into between the two corporations whereby the defendant company agreed to furnish engines, as requested by the plaintiff company. The Henderson corporation failed to furnish the engines, and the A. Y. McDonald Manufacturing Company started suit in the Circuit Court of Stephenson County, against the 303 Henderson Corporation, for damages they alleged they had sustained by a breach of the contract by the defendant company. A complaint was filed by the plaintiff and the defendant filed its answer, and denied that there was any contract entered into between the two parties, as alleged in plaintiff's complaint. The case was tried before the Court without a jury. The Court found the issues in favor of the plaintiff and assessed the damages at \$2,128.50. The Court entered judgment for this amount, and from this judgment an appeal is prosecuted to this Court.

It is insisted by the appellant that there is a variance between the complaint and the proof upon which the plaintiff seeks to recover. A variance is understood to be a substantial departure from the issue and the evidence adduced, and must be in some matter which, in point of law, is essential to the charge or claim, so that the defendant may not be subject to another action for the same cause set out with more certainty and precision in another suit. The facts adduced in evidence and the pleadings in this case tested by this rule do not support the claim of a variance in this suit.

negotiations were carried on between the companies, and it is claimed by McDonald Manufacturing Company that a contract was entered into between the two corporations whereby the defendant company agreed to furnish engines, as requested by the plaintiff company. The Henderson corporation failed to furnish the engines, and the A. W. McDonald Manufacturing Company started suit in the Circuit Court of Stephenson County, against the 303 Henderson Corporation, now damages they alleged they had sustained by a breach of the contract by the defendant company. A complaint was filed by the plaintiff and the defendant filed its answer, and denied that there was any contract entered into between the two parties, as alleged in plaintiff's complaint. The case was tried before the Court without a jury. The Court found the issues in favor of the plaintiff and assessed the damages at \$2,128.50. The Court entered judgment for this amount, and from this judgment an appeal is prosecuted to this Court. It is insisted by the appellant that there is a variance between the complaint and the proof upon which the plaintiff seeks to recover. A variance is understood to be a substantial departure from the issue and the evidence adduced, and must be in some matter which, in point of law, is essential to the charge or claim, so that the defendant may not be subjected to another action for the same cause set out with more certainty and precision in another suit. The facts adduced in evidence and the pleadings in this case tested by this rule do not support the claim of a variance in this suit.

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There is a well established rule of law that a variance cannot be raised for the first time in the Appellate Court, but must be called to the attention of the trial court. If a party has failed to object to the evidence when offered, on the ground of variance, and point out such variance to the trial court, the objection is waived. *Swift & Company vs. Rutkowski*, Vol. 182 page 18; *Kirn vs. The Chicago Journal Co.*, 195 Ill. App. page 197. It is claimed by the appellant that the abstract and record show that the defendant did raise the question of variance by objection in the trial court, and refers the Court to page 25 of their abstract. On examination of the abstract the objection to the question which was propounded to the witness, in our opinion, does not raise the question of a variance, but was an objection to the conversation had with Mr. Madden prior to the time, it is claimed by the appellee, the written contract was entered into. It was stated by the attorney for the appellee at that time, "those are matters by way of inducements and has no bearing upon the contract itself." In the case of *Bonner and Marshall Company vs. Hansell*, 189 Ill. App. 474 on page 485, we find this language: "If appellant's counsel intended by this language to call the attention of the Court and opposing counsel to the alleged variance between the statement of claim and the evidence, they were unfortunate in the choice of words by which they expressed that intention. A

4.

reading of the record convinces us that the trial court did not so understand the motion, and did not, in fact, rule on any question of variance. An objection of that character must be presented to the trial court in more unmistakable terms than the motion made in this case, so that, if necessary, the proper amendment to the pleadings may be made." To the same effect is *Pihl vs. the Springfield Consolidated Railway Company*, 219 Ill. App. 588.

It is seriously insisted by the appellant that there was no contract entered into between the parties to this litigation; that there was only an offer, but no acceptance of the offer; that the minds of the parties never met in regard to the terms of the contract, and therefore it was unenforceable. The learned trial court filed a written opinion in the case which is included in the abstract. We see no useful purpose in quoting the evidence, but suffice it to say that we have read the evidence as abstracted, and carefully read the opinion of the trial court, and we think the evidence clearly sustains the findings of the Court, that there was a valid and existing contract between the parties to this litigation.

It is insisted that the trial court erred in allowing proof of damages, as the same were not based upon proper proof. We can see no merit in this contention. The objection by the defendant to the testimony on the subject

reading of the record convinces us that the trial court did not so understand the motion, and will not, in fact, rule on any question of variance. An objection of that character must be presented to the trial court in some intelligible form than the motion made in this case, no doubt, if necessary, the proper amendment to the pleading may be made. To the same effect is *First vs. the Springfield Consolidated Railway Company*, 213 Ill. App. 558.

It is accordingly insisted by the defendant that there was no contract entered into between the parties to this litigation; that there was only an offer, but no acceptance of the offer; that the minds of the parties never met in regard to the terms of the contract, and therefore it is unenforceable. The learned trial court filed a written opinion in the case which is included in the abstract. We see no useful purpose in quoting the evidence, but suffice it to say that we have read the evidence as abstracted, and carefully read the opinion of the trial court, and we think the evidence clearly establishes the findings of the Court, that there was a valid and existing contract between the parties to this litigation.

It is insisted that the trial court erred in allowing proof of damages, as the same were not based upon proper proof. We can see no merit in this contention. The objection by the defendant to the testimony on the subject

of the dealings by the Stover Manufacturing and Engine Company, Borg-Warner Company and the United States Navy etc., is not well founded. We cannot see any reason why the Court would be influenced one way or the other by this testimony, and it has long been the law that where a case is tried before the Court, it will be presumed that the Court only considered the competent evidence in the case.

We find no reversible error in this case, and the judgment of the trial court is affirmed.

Judgment affirmed.

of the dealings by the Stover Manufacturing and Engine Company, Ford-Warner Company and the United States Navy etc., is not well founded. We cannot see any reason why the Court would be influenced one way or the other by this testimony, and it has long been the law that where a case is tried before the Court, it will be presumed that the Court only considered the competent evidence in the case.

We find no reversible error in this case, and the

judgment of the trial court is affirmed.

Judgment affirmed.

Abstract

Agenda No. 10

Appeal from
County Court
of Piatt County
Illinois.)

Defendant-Appellant

315 L.A. 257

The verified complaint alleged in substance that on February 15, 1939, the plaintiff and the above named defendant made and entered into an agreement in writing delivered at Winona, Minnesota, the terms and conditions of which were duly performed by the plaintiff, whereunder the plaintiff sold and delivered to vendee James Price, party thereto, on board cars at Winona, Minnesota, its products, goods and merchandise in the sum of \$1189.70 between

Abstract

STATE OF MINNESOTA
APPELLATE COURT
THIRD DISTRICT

MAY

January Term A. D. 1942

General No. 9844

THE J. H. WATKINS COMPANY,
a foreign corporation,

Plaintiff-Appellant

Against From
County Court
of Ramsey County
Minnesota

ROLAND BELYERS,

Defendant-Appellee

FILED, P. 11

The J. H. Watkins Company, a foreign corporation, filed

suit in the County Court of Ramsey County against the defendant-
appellant, Roland Belyers, seeking recovery of an amount alleged
to be due from the defendant as earnest money under the terms and pro-
visions of a written contract providing for the sale and delivery
of merchandise by plaintiff to one James H. Price. The contract

was executed and signed by all three parties on February 15,
1939. After defendant's answer and his first and second motions
therein were severally refused by the court upon plaintiff's motion
leave to file a third amended answer was granted and later withdrawn
on defendant's motion. A default followed by judgment in the
sum of \$285.00 and costs of suit, was entered on the verified plead-
ings and exhibits in favor of the plaintiff company and against the
defendant Belyers, from which motion and judgment the latter has
perfected an appeal to this Court.

The verified complaint alleged in substance that on
February 15, 1939, the plaintiff and the above named defendant made
and entered into an agreement in writing, delivered at St. Paul,
Minnesota, the terms and conditions of which are fully set forth
by the plaintiff, wherein the plaintiff sold and delivered to
various James Price, party hereto, on credit sale at St. Paul, Minnesota,
the products, goods and merchandise in the sum of \$1150.00 between

March 8, 1939 and August 12, 1939, copy of which written contract and an itemized statement of all such sales and credits thereon were attached as exhibits to and a part of the verified complaint. It was alleged that credits of \$524.12 were made thereon and that \$665.68 with interest after August 4, 1939 at six per cent remains due and unpaid after due demand therefor, and that the same so remained due from the defendant to plaintiff as surety and guarantor under the terms of said written contract.

Execution and signing of the contract was not denied by the defendant. The contract recited in substance that plaintiff company agreed to sell and deliver to the purchaser, Price, at its current wholesale prices, free on board cars at Winona, Minnesota, or at its option, at any of its other regular places of shipment, such goods and other articles manufactured or sold by it, as the said purchaser may reasonably require from the date of February 15, 1939 until the 1st day of December, 1940, "in the locality in which he is now engaged, or intends to engage in business, a description of which locality he agrees to furnish and deliver to the company in writing prior to its acceptance of this agreement; but the furnishing of such description may be waived by the company at its election, without notice to the purchaser or the sureties hereon."

It was further provided therein that said purchaser agreed to furnish weekly records of cash ^{or} time sales and collections, "which records, however, or any of them, may be waived by the company without notice to the sureties hereon," and he also agrees to furnish a complete financial statement when requested to do so, and prepaid transportation charges were to be so paid by weekly remittances of at least sixty per cent of the amount of sales and collections in accordance with the weekly record blanks, and at the expiration of the term of the agreement, purchaser to pay the whole amount remaining unpaid or to pay for such goods in cash less the usual cash discount allowed thereon, which payments, or any of them, may be waived or extended by

March 8, 1932 and August 19, 1932, copy of which written contract
and an itemized statement of all such sales and credits between were
attached as exhibits to and a part of the verified complaint. It
was alleged that credits of \$284.14 were made between and said \$284.14
with interest after August 4, 1932 at six per cent per annum due and
unpaid after due demand in writing, and that the same so remained due
from the defendant to plaintiff as a debt and demand under the
terms of said written contract.

Execution and signing of the contract was not denied by
the defendant. The contract recited in substance that plaintiff com-
pany agreed to sell and deliver to the defendant, first, of the
current wholesale prices, then on hand and at future, Minnesota,
or at its option, at any of its other regular places of shipment,
such goods and other articles manufactured or sold by it, as the said
purchaser may reasonably require from the date of February 10, 1932
until the last day of December, 1940, "in the locality in which he is
now engaged, or intends to engage in business, a description of which
locally he agrees to furnish and deliver to the company in writing
prior to the acceptance of this agreement; and the furnishing of such
description may be waived by the company as it is elected, without
notice to the purchaser or the writer herein."

It was further provided therein that said purchaser
agreed to furnish weekly records of cash ^{or} sales and collections,
"which records, however, or any of them, may be waived by the company
without notice to the writer herein," and he also agreed to furnish
a complete financial statement when requested to do so, and provided
that transportation charges were to be paid by weekly remittance of at
least sixty per cent of the amount of sales and collections in accord-
ance with the weekly record blank, and at the expiration of the term
of the agreement, purchaser to pay the whole amount remaining unpaid
or to pay for such goods in cash less the daily cash discount allowed
thereon, which payments, or any of them, may be waived or extended by

the company without notice to the sureties or prejudice to rights of the company.

Provision was also made for limiting or suspending shipments until payments were so made and for repurchase of goods in good condition to be shipped back to the company and credited at prevailing wholesale prices.

It was further provided that the purchaser shall have no power or authority to make any statement or representation, or to incur any debt, obligation, or liability of any kind whatsoever, in the name of, or for, or on account of the company, and that the company shall have no interest in the amounts due for goods sold by the purchaser or to change or modify the terms of the agreement, which was mutually agreed to be the entire and only agreement between the parties and that it could not be varied, changed or modified in any respect except in writing executed by the purchaser, and provided that the agreement might be terminated at any time if desired, by either party giving the other party notice in writing by mail.

The clause guaranteeing payment by defendant of amounts so sold and delivered by plaintiff to Price as purchasing vendee provides as follows: "In consideration of the execution of the foregoing Agreement by The J. R. Watkins Company, which we have read, or heard read, and hereby agree and assent to, and its promise to sell, and the sale and delivery by it, to the purchaser, as vendee, of goods and other articles, as therein provided, we the undersigned sureties, do hereby waive notice of the acceptance of this Agreement, notice of default or of nonpayment, and waive action required, upon notice by any statute, against the purchaser; and we jointly severally and unconditionally promise, agree and guarantee to pay for said goods and other articles, and the prepaid transportation charges thereon, at the time and place, and in the manner in said Agreement provided."

the company without notice to the parties or otherwise to rights of the company.

Provision was also made for liability of shipping ship-ments until payments were so made and the responsibility of goods in good condition to be shipped back to the company and credited as pre-ailing wholesale prices.

It was further provided that the purchaser shall have no power or authority to make any statement or representation, or to incur any debt, obligation, or liability of any kind whatsoever, in the name of, or for, or on account of the company, and that the party shall have no interest in the goods and that the party the purchaser or to change or modify the terms of the agreement, which was mutually agreed to be the entire and only agreement between the parties and that it could not be varied, changed or modified in any respect except in writing executed by the purchaser, and provided that the agreement might be terminated at any time if desired, by either party giving the other party notice in writing by mail.

The Chinese guaranteeing payment of difference of exchange to sold and delivered by plaintiff to price as following terms provided as follows: "In consideration of the execution of the foregoing agreement by the U. S. Marine Company, which we have read, or heard read, and hereby agree and warrant to, and its promise to sell, and the sale and delivery by it, to the purchaser, as provided of goods and other articles, as therein provided, we the undersigned, do hereby waive notice of the acceptance of this agreement, notice of default or of nonpayment, and waive action against upon notice by any statute, against the purchaser; and we jointly sever-ally and unconditionally promise, agree and guarantee to pay for said goods and other articles, and the unpaid transportation charges thereon, at the time and place, and in the manner, in said agreement provided."

The contract so executed and delivered was signed by the company, Roland Salyers, defendant and by William A. Price, as parties thereto on February 15, 1939.

The itemized statement exhibited shows 22 f. o. b. sales and shipments of merchandise from Winona, Minnesota, by the plaintiff to Price at various dates within said time, in the aggregate amount of \$1189.70, and 17 credits, including 2 returned shipments of merchandise, all aggregating \$524.12, and a balance due and unpaid on December 2, 1941 of \$665.58.

The answer undertook to set up numerous contentions of an argumentative nature without either admitting or denying many of the material allegations of the complaint. The second amended answer as stricken set forth in substance that defendant neither admits nor denies allegations of paragraph 1 of complaint and requires strict proof of the same; admits that plaintiff and defendant made and entered into an agreement in writing but neither admits nor denies delivery and prays proof thereof; alleges that defendant had no knowledge as to when or where, if ever, contract was delivered; avers attempts to get in touch with Price by correspondence or otherwise and inability to do so; admits contract was dated December 15, 1939, and that a copy thereof attached to complaint fully sets forth the same in detail but avers the same was intended and as a matter of law was and is nothing more or less than a sales agency contract, if legal and valid in other respects, whereunder Price was to receive certain goods which in Illinois could not be legally sold or disposed of without complying with an act to license and regulate transient merchants; that while Price operated or made any such alleged sales, the same were made in Douglas County, Illinois, and operated only out of the City of Tuscola in said county as a transient merchant in violation of Section 159 of Chapter 121 $\frac{1}{2}$ of the Revised Statutes of the State of Illinois.

A second ground or division of the answer set forth that under said contract it was contemplated that Price would peddle said

The contract so executed and delivered was signed by the company, Roland Seligman, defendant, and by William A. Prince, as parties thereto on February 18, 1939.

The itemized statement exhibited above is a bill and shipment of merchandise from Winona, Minnesota, by the plaintiff to Prince at various dates within said time, in the aggregate amount of \$1183.70, and 12 credits, including 3 returned shipments of merchandise, all aggregating \$364.18, and a balance due and unpaid on December 8, 1939 of \$819.52.

The answer thereto is set as follows: Defendant is an argumentative nature without either a recital or setting forth of the material allegations of the complaint. The second paragraph thereof as set forth in evidence does not contain any facts which deny allegations of paragraph 1 of complaint and repeats verbatim proof of the same; admits that plaintiff and defendant made and entered into an agreement in writing but neither admits nor denies delivery and pays proof thereof; alleges that defendant and its associates to whom or where, if ever, contract was delivered; every attempt to get in touch with Prince by correspondence or otherwise and its ability to do so; admits contract was dated December 18, 1939, and that a copy thereof attached to complaint filed in this case was in detail but were the same was intended and as a matter of fact and is nothing more or less than a sales agency contract, if legal and valid in other respects, whereas Prince was to receive certain goods which in Illinois could not be legally sold or disposed of without complying with an act to license and regulate transient merchants; that while Prince operated on same and such alleged sales, the same were made in Douglas County, Illinois, and operated only out of the City of Tuscola in said county as a transient merchant in violation of Section 156 of Chapter 117 of the Revised Statutes of the State of Illinois.

A second ground or division of the answer set forth that under said contract it was contemplated that Prince would peddle said

goods as a transient merchant in the State of Illinois and was prohibited by law from so doing without a license and contended that no further answer need be made; that the alleged contract was that said Price, as a principal, for which this defendant was guarantor, if otherwise legally liable thereunder, became void under the terms of said act requiring license as a transient merchant.

A third ground or division of the answer also set forth in an argumentative manner the contention that the contract was null and void as to the defendant as surety and was fraudulently made and intended to evade the laws of the State of Illinois on grounds I and II requiring a license by said Price as a transient merchant; that plaintiff knew, or by mutual understanding, it was understood and that it does so affirmatively appear from the face of the contract that Price was to act as a transient merchant in Illinois but limited within the neighborhood or vicinity in which Price was then living, namely, about four miles west of the City of Monticello, Illinois, and that plaintiff and Price arranged that the latter move away from said community, about fifty miles to Tuscola in a strange community wherein Price was not acquainted with the financial circumstances of prospective buyers and made some sales to irresponsible persons which remained unpaid; averred further that the contentions so set forth with much argument "only shows that this defense is based upon the fact that the contract is fraudulent upon its face and for that reason alone could not be enforced against this defendant under the facts as this defendant has alleged them to be."

A fourth alleged grounds of defense set forth a denial that the plaintiff has performed conditions required by the agreement and that unless the same are set out, defendant was unable to admit or deny that the various sales and deliveries were made to Price in the amount of \$1189.70 as alleged and set forth in itemized statement marked Exhibit 2, because he has been unable to communicate with Price and prays strict proof of the same, as if the same had been specifically denied. Paragraphs 9 and 10, being part of said grounds or division of the answer, is a long and argumentative statement of the above and

of other matters which we deem wholly immaterial to the issues herein. Paragraph II concludes "and defendant, for reasons hereinabove assigned, denies that the plaintiff is entitled to have a judgment for \$665.58 with interest thereon from August 4, 1939, at the rate of six per cent per annum, together with its costs and disbursements herein, or any part thereof as against him." The answer was verified by defendant.

The original answer set up substantially the same grounds which, when stricken, were realleged with greater particularity and length in the first amended answer and again restated at greater length and with much argument, in the second amended answer.

The defendant's contention that the contract signed by the parties created the relationship of principal and agent is without merit. The language of the contract is plain and unambiguous. It simply provides for the sale of goods to be purchased by and delivered to the vendee on certain specified terms and for payment of the purchase price on terms expressly set forth in the contract. The relationship of principal and agent is not created by an agreement whereby one undertakes to sell goods to another, the latter to pay for the goods so ordered at fixed or defined prices and on terms expressly stipulated in a written contract. The subsequent sale of the property by the purchaser at his own risk created no agency relationship between the original vendor and vendee. Whether or not the merchant who thus purchased and procured the goods for subsequent resale was or was not required to procure a license as a transient merchant in Illinois was immaterial under the terms of the contract in question which lawfully provided for the sale and delivery of the goods to the purchasing vendee in Winona, Minnesota. The goods and merchandise constituting the sales and deliveries in question were so made, payment of the purchase price was in default under the terms of the contract and the liability of the surety who guaranteed payment thereof thereupon accrued under the specific provisions and terms of the contract as hereinabove set forth. The conversations, if any, that the parties may have had prior to the

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execution of the written contract became merged therein and could not be shown to alter or vary its plain and unambiguous terms. No facts to support the conclusions of fraud as between the parties are set forth in the answer and we deem the contentions of the defendant who seeks to avoid the provisions of the contract creating a liability against him to be without merit and that no affirmative legal defense was set forth in the answer.

The repeated attempts by rule of the Court to procure an answer that either directly admitted or denied- or set up under oath a lack of knowledge and the reason therefor in not admitting or denying the material allegations of the complaint were not complied with by the defendant. The answers were in each instance properly stricken by the Court as not being responsive to the affirmative allegations of the complaint and as not constituting an affirmative legal defense under any of the alleged facts, circumstances or conclusions set forth therein.

After the second amended answer had been stricken and leave to file a third amended answer had been granted, the defendant moved the Court that the order granting leave to file a third amended answer be withdrawn and insisted upon a right to appeal from the order of the Court striking the second amended answer. Defendant thereupon was in default as having no answer or pleadings on file and in refusing to file any further pleading therein; insisting that he would appeal from such order striking the second amended answer. The ruling of the Court in striking the second amended answer was not a final and appealable order, (Daab v. Ritter, 294 Ill. App.203, 13 N. E.(2d) 636; Eglin v. Glatz, 287 Ill.App. 44; 4 N. E.(2d)259), and no appeal could be taken therefrom.

The default for failure to plead was then properly entered against the defendant, and under the record herein, it affirmatively appears that the Court properly entered judgment for the amount set forth and shown to be due under the verified complaint, exhibits and computations therefrom, including the unpaid balance on

examination of the written contract between the defendant and the plaintiff. The contract was not shown to either of them and the defendant was not allowed to see it. The contract was not shown to either of them and the defendant was not allowed to see it. The contract was not shown to either of them and the defendant was not allowed to see it.

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After the second amended answer and demurrer were filed, the court entered an order granting the defendant's motion to dismiss the second amended answer. The court's order was based on the fact that the second amended answer failed to state a claim for which relief could be granted. The court's order was affirmed by the appellate court. The court's order was based on the fact that the second amended answer failed to state a claim for which relief could be granted. The court's order was affirmed by the appellate court.

[illegible]

the account and interest accrued in the aggregate sum of \$798.70, together with costs of suit. No motion to set aside the finding as to damages or judgment entered therefor appears in the record.

In its rulings and judgment, the Court committed no reversible error and we deem the assignments of error by the defendant herein to be without merit. The judgment of the County Court of Piatt County will, therefore, be affirmed.

JUDGMENT AFFIRMED.

the accounts and interest received in the aggregate sum of \$1,000.00,
together with costs of suit. It is further ordered that the
as to damages on judgment entered against the party in the several.
In the rulings and judgments, the Court rendered in
reversible error and we deem the same to be of the highest
and merit to be without error. The judgment of the County Board
of State County will, therefore, be affirmed.

UNITED STATES

Abstract

General ~~number~~ ^{No} 9371.

Agenda ~~number~~ ^{No} 2.

IN THE APPELLATE COURT
OF ILLINOIS
THIRD DISTRICT
MAY TERM, A. D. 1943.

310 I.A. 257²

WILLIAM B. CARR, : APPEAL FROM THE CIRCUIT COURT
Plaintiff-Appellee, : OF CHAMPAIGN COUNTY.

-vs-

RALPH BLACKSTOCK,
Defendant-Appellant.

RALPH BLACKSTOCK, MARY BLACK-
STOCK, and ANNA BLACKSTOCK,
Counter-Claimants-Appellants,

-vs-

WILLIAM B. CARR, : ~~HONORABLE FRANK B. LEONARD,~~
Counter-Defendant-Appellee. : Judge Presiding.

HAYES, J.:

This action arises out of a collision between two cars which occurred on the morning of November 3, 1940 on State Route 45 about one-quarter of a mile south of Tolona, Illinois. Plaintiff, William Carr, had driven his car around a curve just outside of that city and had turned straight south when his car collided with another car going in the opposite direction driven by Ralph Blackstock. Blackstock was accompanied by his wife, Anna Blackstock, his daughter-in-law, Mary Blackstock, and his grandson, John Blackstock. Carr filed his complaint in the Circuit Court

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This section states that the collision occurred at about 10:00 p.m. on June 17, 1968, on State Route 19 about one-quarter of a mile south of Tolono, Illinois. Plaintiff, William Lee, was driving west around a curve just outside of town and had turned straight again when his car collided with another car going in the opposite direction driven by Ralph Blackstock. Blackstock was accompanied by his wife, Anna Blackstock, his daughter-in-law, Mary Blackstock, and his nephew, John Blackstock. Carr filed his complaint in the Circuit Court

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of Champaign County against Ralph Blackstock who thereafter filed his answer denying the allegations of the complaint and also filed a counter-claim against Carr. By leave of Court, Mary Blackstock, Anna Blackstock and John Blackstock intervened and filed their counter-claims against Carr who answered each of them. John Blackstock later withdrew his counter-claim. The cause was tried before a jury who returned a verdict in favor of Carr against Ralph Blackstock for \$595.00. The jury also returned a special verdict in favor of Carr against each counter-claimant and in answer to the special interrogatory: "Was the plaintiff William B. Carr in the exercise of ordinary care and caution for his own safety, the safety of others and the safety of his property at and prior to the time of the collision in question" replied: "Yes". The defendant and counter-claimants joined in a motion in arrest of judgment, for judgment non obstante verdicto and in the alternative for a new trial. This motion was overruled and judgment entered by the Court. The defendant and counter-claimants have prosecuted a joint appeal to this Court.

Plaintiff contends both in his brief and in a motion to strike certain portions of the brief, abstract and record of defendant and counter-claimants that the latter cannot prevail on this appeal so far as their counter-claims are concerned because they failed in their post trial motion in the trial court to question the finding of the jury on the special interrogatory. Plaintiff argues that because of this failure to object, the defendant and counter-claimants have acquiesced in the finding of the jury that plaintiff was not guilty of contributory negligence. He further argues that since plaintiff must be considered

of Champaign County against Ralph Blackstock who thereafter filed his answer denying the allegations of the complaint and also filed a counter-claim against said Ralph Blackstock. Harry Blackstock, Anna Blackstock and John Blackstock intervened and filed their counter-claims against Carr who answered each of them. John Blackstock later withdrew his counter-claim. The case was tried before a jury who returned a verdict in favor of Carr against each counter-claimant and in answer to the special interrogatory: "Was the plaintiff William B. Carr in the exercise of ordinary care and attention for his own safety, the safety of others and the safety of his property at and prior to the time of the collision in question?" replied: "Yes." The defendant and counter-claimants joined in a motion in arrest of judgment, for judgment non obstante veredicto and in the alternative for a new trial. This motion was overruled and judgment entered by the Court. The defendant and counter-claimants have prosecuted a joint appeal to this Court.

Plaintiff contends both in his brief and in a motion to strike certain portions of the brief, submitted and record of defendant and counter-claimant that the latter cannot prevail on this appeal so far as their counter-claims are concerned because they failed in their post trial motion in the trial court to question the finding of the jury on the special interrogatory. Plaintiff argues that because of this failure to object, the defendant and counter-claimants have acquiesced in the finding of the jury that plaintiff was not guilty of contributory negligence. He further argues that since plaintiff was not considered

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free from negligence, as far as the counter-claims in this cause are concerned, no basis exists for this appeal. We agree with this contention. The jury specially found that plaintiff was not negligent and defendant and counter-claimants did not attack this finding in their motion for a new trial; that motion was directed solely against the general verdict. We must therefore hold that defendant and counter-claimants waived their right to question on this appeal the validity of the finding of the jury on the special interrogatory and that the judgment below on the counter-claims cannot be challenged here. *Rubottom v. Crane Co.* 302 ^{Ill.} App. 58, and cases cited therein.

Defendant Blackstock contends that the verdict of the jury on the issues raised by the original complaint and answer is against the manifest weight of the evidence. At the trial he introduced evidence tending to prove that he was driving about 30 miles per hour in his own lane of traffic and that plaintiff shortly before the impact swerved over into his lane thereby causing the collision. Defendant testified that after the accident plaintiff told him at the hospital that the radio in his car ceased operating as he went around the curve; that he leaned over to fix it and did not see defendant's car until it was too late to avoid the collision. Plaintiff denied making this statement and submitted proof that the radio in his car was running after the collision and while the car was in the ditch. Plaintiff also testified that defendant's car was zigzagging from one lane to the other as it approached him; that he unsuccessfully attempted to avoid the collision and that the impact occurred in plaintiff's lane of traffic. In support of this he introduced photographs taken after the accident at its scene tending

used photographs taken after the accident at the scene showing
in plaintiff's lane of traffic. In support of this he intro-
duced evidence that the collision was the result of the defendant's
attempt to avoid the collision and that the impact occurred
lane to the other as it approached and left the intersection
also testified that defendant was not changing into one
the collision. Plaintiff asked that this evidence be
did not see defendant's car until it was too late to avoid
went around the curve; that he learned that it was
hospital that the radio in the car ceased operating as he
testified that after the accident plaintiff told him that he
over into his lane thereby causing the collision. Plaintiff
traffic and that plaintiff shortly before the collision was
was driving about 30 miles an hour in his own lane and
the trial he introduced evidence tending to prove that he
answer is against the highest weight of the evidence. It
the jury on the issues raised by the trial is sufficient to
statements of fact contained in the report of

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to sustain his theory of the case and showing streaks of oil from the alleged point of collision in plaintiff's lane to a point in defendant's lane where defendant's car finally came to rest.

We believe that the issue of fact presented here was one properly to be decided by the jury and that although the question is close there is sufficient evidence to sustain their verdict. We therefore hold that the verdict cannot be disturbed by this Court.

Defendant also contends that the trial court erred in admitting testimony by one of plaintiff's witnesses to the effect that a black Packard car passed him prior to the accident and some distance from its scene going 70 miles an hour. This testimony was admitted over objection only after defendant had admitted on adverse examination that he was driving a black Packard car and that he had been driving at a constant rate of speed for many miles prior to the accident. While evidence of this type has been declared inadmissible where there is no proof of a constant rate of speed, it is not objectionable where such proof is first offered as a foundation. *Denton v. Midwest Dairy Products*, 284^{Ill.} App. 279. While it is true as defendant contends, that the witness in question was unable to identify the driver of the black Packard as the defendant, nevertheless this objection goes to the weight of his evidence rather than to its admissibility.

Defendant next alleges that the trial court erred in giving plaintiff's instruction A-1 which summarized the allegations of the complaint. He argues that the jury must of necessity have been confused by it and that it tended to convey the impression that plaintiff not only alleged the

point in defendant's time where defendant's car finally came from the site of collision in which it was involved to maintain his theory of the case and that he was not

distributed by this Court.

defendant also contended that the trial court erred in admitting testimony by one of plaintiff's witnesses to the effect that a black Packard car passed him prior to the accident and some distance from the scene, going to the left. This testimony was admitted over objection only after defendant had admitted on adverse examination that he was driving a black Packard car and that he had been driving at a constant rate of speed for many days prior to the accident. While evidence of this type has been declared inadmissible where there is no proof of a constant rate of speed, it is not objectionable where such proof is shown, offered as a foundation. *Donner v. Brown*, 117 Mo. 227, 234 App. 378. While it is true as defendant contends, that the witness in question was unable to identify the driver of the black Packard as the defendant, nevertheless this objection goes to the weight of his evidence rather than to its admissibility.

convey the impression that plaintiff not only alleged the
of necessity have been construed by it and that it tended to
allegations of the complaint. He argues that the jury must
in giving plaintiff's instruction A-1 which summarized the
Defendant next alleges that the trial court erred

5.

facts stated therein but had also proved them. We believe that this instruction was properly guarded at its conclusion where it was stated that the defendant in his answer denied all the charges of negligence and that neither the complaint nor the answer were to be considered by the jury as evidence. Instructions of this type have been repeatedly approved by the Courts of this State. ^{Ill.} Murphy v. King, 284 App. 74; ^{Ill.} Sollars v. Review Publishing Company, 264 App. 207; Bobalek ^{Ill.} v. Atlass, 315 App. 514.

Defendant also questions the rulings of the trial court refusing certain of his instructions. These rulings cannot be reviewed here however because defendant has failed to point out in what particular the Court erred in its refusals. Bituminous ^{Casualty} ~~Gas~~ Corporation v. City of Harrisburg, ^{Ill.} 315 App. 243; ^{Ill.} McGoorty v. Benhart, 305 App. 458. This Court will not search the record to discover errors; where errors are assigned they must be described with particularity and supported by argument.

For the reasons stated the judgment of the Circuit Court of Champaign County is affirmed.

JUDGMENT AFFIRMED.

facts stated therein but had also proved them. I believe that this instruction was properly granted as its conclusion where it was stated that the defendant in his answer denied all the charges of negligence and that neither the complaint nor the answer were to be considered by the jury as evidence.

Instructions of this type have been repeatedly approved by the Courts of this State. *Wright v. Line*, 287 Ill. 111; *Gilman v. Review Publishing Company*, 286 Ill. 127; *Horsick v. Atlas*, 315 Ill. App. 514.

Defendant also questions the ruling of the trial court refusing certain of his instructions. These rulings cannot be reviewed here however because defendant has failed

to point out in what particular the court erred in its refusal. *Alston v. City of Springfield*, 315 Ill. App. 243; *McGearty v. Bennett*, 302 Ill. App. 458. This court will not search the record to discover errors where errors are assigned they must be described with particularity and supported by argument.

For the reasons stated the judgment of the Circuit Court of Champaign County is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

Abstract

31944-4
7/15/43
May Term, A. D. 1943.

General No. 9375

Agenda No. 3

ETHEL TRIMMER, Administrator,
etc.,
Plaintiff-Appellant,

-vs-

THE FRANKLIN LIFE INSURANCE CO.,
et al.,
Defendants-Appellants.

Appeal from
Circuit Court
Macon County.

DADY, J:

319 I.A. 20

William A. Hinkle, herein referred to as the "decedent" died intestate on July 28, 1941. At the time of his death he had an insurance policy on his life for \$2,000 in The Franklin Life Insurance Co. Originally the policy was payable to his wife, Amanda Hinkle, if living, - otherwise to his executors, administrators or assigns. Amanda Hinkle, the then beneficiary, died on June 8, 1936.

On August 19, 1936, decedent executed and sent, or caused to be sent, to the Insurance Co. a written request for change of beneficiary, pursuant to which the Insurance Co. on August 20, 1936, caused an indorsement to be made on the policy which indorsement stated that the insured had changed the beneficiary, making the insurance payable to Ruth Rowe and Orville Hinkle, who were two of his five children.

The complaint, filed by the appellant as administratrix of the estate of decedent, charged that on August 20, 1936, and for

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

Abstract

May Term, A. D. 1938.

General No. 1938

Appellate No. 3

Appeal from
Circuit Court
Jackson County.

THOMAS TRIMMER, Administrator,
et al.,
Plaintiffs-Appellants,

-vs-

THE FRANKLIN LIFE INSURANCE CO.,
et al.,
Defendants-Appellees.

JURY, 11

William A. Hinkle, herein referred to as the "decedent" died intestate on July 28, 1931. At the time of his death he had an insurance policy on his life for \$5,000 in the Franklin Life Insurance Co. Originally the policy was payable to his wife, Amanda Hinkle, if living, - otherwise to his executor, administrator or assignee. Amanda Hinkle, the then beneficiary, died on June 8, 1936.

On August 19, 1936, decedent executed a will, or caused to be sent, to the Insurance Co. a written request for change of beneficiary, pursuant to which the Insurance Co. on August 20, 1936, caused an instrument to be made on the policy which indorsement stated that the insured had changed the beneficiary, making the insurance payable to Ruth Howe and Orville Hinkle, who were two of his five children.

The complaint, filed by the appellant administrator with the estate of decedent, charged that on August 20, 1936, and for

a long time prior thereto, decedent was insane and did not have sufficient mental capacity to know the consequences of such change of beneficiary, and that therefore the request for such change was invalid. The complaint prayed that such change of beneficiary be set aside and that the Insurance Co. be required to pay plaintiff the proceeds of the policy.

Defendants, Ruth Rowe and Orville Hinkle, by their answer, denied that on August 20, 1936, or prior thereto, decedent was insane or did not have mental capacity to know the consequences of such change of beneficiary, and denied that such request for change of beneficiary was void.

The remaining defendant, the Insurance Co., by its answer neither admitted nor denied the charges of incompetency, but asked for strict proof.

The Insurance Co. filed a counter-claim stating it was ready to pay the \$2,000, asking leave to pay the same to the clerk of the court, and asking that the right thereto be adjudicated.

By agreement of all parties such \$2,000 was then deposited with the clerk of the circuit court, and an order was entered dismissing the Insurance Co. from the suit.

The chancellor heard the evidence and entered a decree finding that decedent on August 20, 1936, had sufficient mental capacity to and did comprehend the nature and effect of his act with reference to such change of beneficiary, and directing the clerk to pay the money to Ruth Rowe and Orville Hinkle, and dismissing the suit for want of equity.

Plaintiff as administratrix brings this appeal.

Decedent was aged 86 years at the time he executed such change of beneficiary. At the time of the death of his wife,

and for many years prior thereto, he and his wife lived in a small community, living alone except for some household help during her last illness. After his wife's death he continued to live in such home until April 26, 1938, when he was adjudged insane and committed to Jacksonville, where he was at the time of his death.

From About May 9, 1936, until November 5, 1936, Mrs. Trimmer, who was one of his daughters, with her husband and six small children, lived with the decedent. On the latter date she and her family moved out, because of some difficulty with decedent, apparently incompatibility. From March to May, 1937, James Dunaway and wife lived with decedent, - Mrs. Dunaway doing the housework.

~~Apparently decedent lived alone in the same house at all other times after the death of his wife until taken to Jacksonville.~~

Thirteen witnesses testified for the plaintiff and ten for defendants.

Seven lay witnesses for plaintiff testified that they had been well acquainted with and had frequently seen and talked with decedent during periods varying from fourteen to thirty six years. Their testimony showed or tended to show that: After the death of his wife he was in feeble health; he had to use a cane and crutch; on occasions he had to be assisted in walking to the toilet, and had to be assisted in buttoning his clothes; he cried considerably, particularly in talking about his deceased wife; on occasions he indicated by words that he might take his life; he abused and mistreated a dog owned by Mrs. Trimmer while she was living with him; he at times in daylight, when his neighbors might see him, urinated from his front porch and in his back yard; at times he was melancholy and at other times appeared to be in a daze and childish; he asked one of his neighbors if he thought he was ever mean to his woman (meaning his deceased wife) and said the

neighbors were talking about him; he said his children were trying to send him to Jacksonville; when Mrs. Trimmer and family moved out he walked in his yard with a shot gun in his hand, and the next day when a neighbor asked him to give up the gun he refused, saying he was going to kill all of them and end himself; he talked about his chickens being stolen when in fact there had been no theft; and after his wife died he told a neighbor they had no need to take her away, that the family wanted her taken away. Five of them expressed the opinion decedent was of unsound mind and incapable of transacting ordinary business on August 20, 1936.

W. A. Ivey, a local agent of the Insurance Co., testified he had met decedent three or four times over a period of three or four years; that after Mrs. Hinkle died decedent came to Ivey's office with his daughter Mrs. Trimmer, and wanted to surrender the insurance policy for cash, saying his wife had died; that Ivey told him the policy was not due and it would be ~~poor practice~~ ^{inadvisable} to have it cashed on account of decedent being aged; that thereupon decedent became very much excited and slammed the policy on the counter and then on the floor and kept repeating he wanted the money.

Mrs. Totten, one of his daughters, testified that at his request she took decedent to Ivey's office on June 10, 1936, and when Ivey told decedent that the insurance was not on his wife but his own life, and he could not get the money, decedent swore and threw the policy on the floor.

Mrs. Totten also testified that on August 6, 1936, Orville Hinkle told her in the presence of Mrs. Rowe she could no doubt have a conservator appointed for Mr. Hinkle, because he had lost his mind, but that she would be unable to send him to Jacksonville. Mrs. Bitterick, a daughter of Mrs. Totten, testified

neighbors were talking about him; he said his children were trying to send him to Jacksonville; when Mrs. Timmer and family moved out he waited in his yard with a shot gun in his hand, and the next day when a neighbor asked him to give up the gun he refused, saying he was going to kill all of them and himself; he talked about his children being scared when in fact there had been no threat; and after his wife died he told a neighbor they had no need to take her away, that the family wanted her taken away. Five of them expressed the opinion decedent was of unsound mind and incapable of transacting ordinary business on August 30, 1936.

W. A. Ivey, a local agent of the Insurance Co., testified he had met decedent three or four times over a period of three or four years; that after Mrs. Hinkle died decedent came to Ivey's office with his daughter Mrs. Timmer, and wanted to surrender the insurance policy for cash, saying his wife had died; that Ivey told him the policy was not due and it would be ~~worthless~~ to have it cashed on account of decedent being aged; that thereupon decedent became very much excited and affirmed the policy on the counter and then on the floor and kept repeating he wanted the money.

Mrs. Totten, one of his daughters, testified that at his request she took decedent to Ivey's office on June 10, 1936, and when Ivey told decedent that the insurance was not on his wife but his own life, and he could not get the money, decedent swore and threw the policy on the floor.

Mrs. Totten also testified that on August 6, 1936, Grville Hinkle told her in the presence of Mrs. Howe she could not doubt have a conservator appointed for Mr. Hinkle, because he had lost his mind, but that she would be unable to send him to Jacksonville. Mrs. Bitterick, a daughter of Mrs. Totten, testified

that she overheard this conversation.

Mrs. Trimmer testified about living with decedent from May 9, 1936, until November 5, 1936; that during such time he cried a great deal and was forgetful and in very poor health; that on one occasion he said he would not be there in the morning; that one morning he imagined he had slept in the shed and said he was with "mama" last night and was going to her now, and then left the house and was gone all day; that on one occasion he said "You girls are trying to send me to Jacksonville"; that he would wake up at night and say some one was trying to steal his chickens, and say that he saw a man sneaking under the window, but she looked and saw no one.

Doctor Lindsey testified that he had known decedent for thirty years preceding decedent's death and was one of the commissioners that adjudged decedent insane on April 26, 1938. He was then asked a hypothetical question covering the history of decedent beginning with the time he was adjudged insane. In reply he stated that such hypothetical person was not of sound mind and not capable of transacting ordinary business on August 20, 1936. On cross examination he stated that such person might know what he was doing.

Six laymen, who had been neighbors of decedent testified for the defense. They were: Walters, who had known him all of the witness' life; Primmer, a barber, who had shaved him once a week for the two years beginning in 1934; Gillen, who was a brother in law of Orville Hinkle; Minnie Thomas, who helped with the housework in the Hinkle home for the last three weeks before the death of Mrs. Hinkle; Goldie King, who had known decedent for the last twenty years, and also helped care for Mrs. Hinkle during her last illness, and Minnie Marquis, who knew and had seen him about twice a week for the last several years. Each of them expressed the

that she overheard this conversation.

Mrs. Trimmer testified about living with decedent from May 8, 1938, until November 3, 1938; that during such time he cried a great deal and was forgetful and in very poor health; that on one occasion he said he would not be there in the morning; that one morning he imagined he had slept in the shed and said he was with "mama" last night and was going to her now, and then left the house and was gone all day; that on one occasion he said "You girls are trying to send me to Jacksonville"; that he would wake up at night and say some one was trying to steal his chickens, and say that he saw a man sneaking under the window, but she looked and saw no one.

Doctor Lindsay testified that he had known decedent for thirty years preceding decedent's death and was one of the commissioners that adjudged decedent insane in April 30, 1939. He was then asked a hypothetical question covering the history of decedent beginning with the time he was adjudged insane. In reply he stated that such hypothetical person was not of sound mind and not capable of transacting ordinary business on August 20, 1938. On cross examination he stated that such person might know what he was doing.

Six laymen, who had been neighbors of decedent, testified for the defense. They were: Walters, who had known him all of the witness' life; Primmer, a barber, who had shaved him once a week for the two years beginning in 1934; Gilpin, who was a brother-in-law of Orville Hinkle; Minnie Thomas, who helped with the housework in the Hinkle home for the last three weeks before the death of Mrs. Hinkle; Goldie King, who had known decedent for the last twenty years, and also helped care for Mrs. Hinkle during her last illness, and Minnie Mardus, who knew and had seen him about twice a week for the last several years. Each of them expressed the

opinion that on August 20, 1936, decedent was capable of transacting ordinary business.

Dr. Mertz who had known decedent for about fifteen years prior to his death and had attended decedent and his wife, and who last saw him in 1938 in the hospital, expressed the opinion that decedent was of sound mind and capable of transacting ordinary business on August 20, 1936. He did not remember seeing decedent from May, 1936 until January 13, 1938.

Charles Boachers, an attorney, testified that he had known decedent for about twenty five years, and had seen and talked with him on different occasions; that in August, 1936, decedent came to Boachers office with an insurance policy and spoke of the death of his wife, that she had been the beneficiary under the policy and that he wanted the beneficiary changed; that thereupon Boachers wrote the application for a change, decedent signed it and his signature was witnessed by Boachers and another lawyer named Walters; that decedent was in the office for about one hour, and the witness then sent the application to the insurance company together with the policy; that later the policy was returned to the witness and he thereafter had possession of it up to the time of the trial; that sometime in September, 1936, decedent returned to such office alone and told the witness to keep the policy. He expressed the opinion that decedent was able to transact ordinary business and was of sound mind on August 20, 1936.

C. C. Walters testified that he knew decedent for about twenty five or thirty years, during which time he occasionally talked with him; on August 20, 1936, Walters signed as a witness to the change of beneficiary; that Walters was in the office about five minutes. He expressed the opinion that decedent was then capable of transacting ordinary business.

opinion that on August 30, 1936, decedent was capable of transacting ordinary business.

Dr. Martin who had known decedent for about fifteen years prior to his death and had attended decedent in his life, and who last saw him in 1938 in the hospital, expressed the opinion that decedent was of sound mind and capable of transacting ordinary business on August 30, 1936. He did not remember seeing decedent from May, 1936 until January 15, 1938.

Charles Boschers, an attorney, testified that he had known decedent for about twenty five years, and had been well talked with him on different occasions; that in August, 1936, decedent came to Boschers office with an insurance policy and spoke of the death of his wife, that she had been the beneficiary under the policy and that he wanted the beneficiary changed; that thereupon Boschers wrote the application for a change, decedent signed it and his signature was witnessed by Boschers and another lawyer named Walters; that decedent was in the office for about one hour, and the witness then sent the application to the insurance company together with the policy; that later the policy was returned to the witness and he thereafter had possession of it up to the time of the trial; that sometime in September, 1936, decedent returned to such office alone and told the witness he had signed the policy. He expressed the opinion that decedent was able to execute ordinary business and was of sound mind on August 30, 1936.

C. C. Walters testified that he knew decedent for about twenty five or thirty years, during which time he occasionally talked with him; on August 30, 1936, Walters signed as a witness to the change of beneficiary; that Walters was in the office about five minutes. He expressed the opinion that decedent was then capable of transacting ordinary business.

Plaintiff introduced in evidence the record of insanity proceedings had in the county court by which decedent was adjudged insane on April 26, 1938, and in so doing introduced in evidence the report of the commission of two physicians filed on the same date in such proceeding which report stated decedent "is suffering from senile dementia from which we conclude that he is insane". Such court, however, sustained an objection to the admission in evidence of the record of the printed interrogatories and answers thereto filed in such proceeding by the commission with its report. Plaintiff assigns this as error.

A record of insanity proceedings is competent to prove the patient's mental condition at the time of the inquisition. (Belz v. Pipenbrink, 318 Ill. 528; Holiday v. Shepard, 269 Ill. 429; Witt v. Heyen, 115 Kans. 334; 222 Pac. 120)

Our statute (Chap. 85, Par. 9, Sec. 9) provides that the commission of physicians appointed by the court in an insanity proceeding shall furnish ^{the} in court in writing "answers to such interrogatories as may be contained in a form to be prescribed by the State Commissioners of Public Charities and shall certify that the same are correct to the best of their knowledge and belief, which interrogatories shall be submitted" to the medical members of the commission by the court. It is our opinion that the record of such interrogatories and answers were competent and should have been admitted in evidence in the trial court along with the finding of the commission. However, we have carefully considered the content of the various questions and answers and we do not think that the exclusion of such evidence seriously prejudiced plaintiff's case. At most, the questions and answers only showed the basis for the finding of insanity made by the commission. The finding itself was the principal evidentiary fact and furnished the chancellor with the conclusions of the commission.

The plaintiff called as witnesses, Myrtle Totten and Ethel Trimmer, two of the children of the deceased. When Mrs. Totten was called objection was made to her competency. The objection was first sustained, but later the judge said he would let her testify "on the promise you will submit to me an authority prior to the next time we meet." It does not appear that at any time thereafter the matter of her competency was discussed or ruled on, except that the record shows she was thereafter permitted to testify subject to the objection. When Mrs. Trimmer was called the same objection was made as to her competency, but the record shows no ruling on the objection.

Plaintiff contends both witnesses were competent. Defendants now make no reply to such contention. It is our opinion both witnesses were competent, as the defendants were not defending as heirs or devisees of the decedent, but as beneficiaries under the written assignment. (See Essary v. Marvel, 274 Ill. 576; Simpson v. ^aWrote, 237 Ill. 520.)

Plaintiff in her briefs and arguments then says, "Whether this evidence was considered or rejected by the chancellor does not clearly appear." Where a ruling on a motion or objection is reserved by the trial court, the movant or party objecting must subsequently obtain a direct decision or ruling in order to preserve the motion or objection for appellate review. (4 C.J.S. p. 657.) The presumption is that the trial court took into consideration all competent evidence that was admitted, (Potter v. Gronbeck, 117 Ill. 404; 5 C.J.S. p. 404), and it is presumed that the trial court considered only the competent evidence admitted. (Geiger v. Merle, 260 Ill. 497.) He who insists error has intervened in the proceedings in the lower court must make such error manifest by the record. (Central Tr. Co. v. Hagen, 339 Ill. 384.) Applying the foregoing rules, it must be presumed the trial court duly

The plaintiff called as witnesses, Myrtle Trotter and

Etzel Trotter, two of the children of the deceased. When the

Trotter was called objection was made to her competency. The

objection was first sustained, but later the judge said he would

let her testify "on the promise you will shut up as an attorney

prior to the next time we meet." It was not again stated at any

time thereafter the matter of her competency was discussed or

ruled on, except that the record shows she was asked and permitted

to testify subject to the objection. The fact Trotter was called

the same objection was made as to her competency, but the record

shows no ruling on the objection.

Plaintiff contends both witnesses were competent.

Defendants now have no reply to such contention. It is our opinion

both witnesses were competent, as the defendants were not defending

as heirs or devisees of the deceased, but as beneficiaries under

the written assignment. (See Hessley v. Harvey, 274 Ill. 528;

Simson v. White, 237 Ill. 380.)

Plaintiff in her briefs and arguments then says:

"Whether this evidence was considered or rejected by the chancellor

does not clearly appear." Where a ruling on a motion or objection

is reserved by the trial court, the record or party objecting must

immediately obtain a direct decision or ruling in order to preserve

the motion or objection for appellate review. (4 C.J.S. p. 637.)

The proposition is that the trial court took issue on a question

all competent evidence that was admitted. (Trotter v. Goodrich,

117 Ill. 404; 3 C.J.S. p. 404), and it is presumed that the trial

court considered only the competent evidence admitted. (Golden

v. Marie, 260 Ill. 497.) He who insists error has intervened in

the proceedings in the lower court must make such error manifest

by the record. (Central Tr. Co. v. Haden, 268 Ill. 684.) Applying

the foregoing rules, it must be presumed the trial court duly

considered the testimony of Mrs. Totten and Mrs. Trimmer.

The next contention of the plaintiff is that the trial court admitted improper evidence on behalf of the defendants in that such court permitted, over objection, lay witnesses to express their opinions as to the mental condition and ability of decedent to transact ordinary business on August 20, 1936. These witnesses testified to facts showing they had a close acquaintance and had frequently talked with and observed the decedent within a reasonable time of the date in question. It is our opinion that the trial court did not abuse its discretion in permitting such witnesses to so testify, and that there was no error in the admission of such testimony. (Catt v. Robins, 305 Ill. 76.)

The remaining contention of the defendant is that the finding and judgment of the trial court is against the manifest weight of the evidence. Where the chancellor receives the evidence in open court and sees the witnesses and hears them testify, he has a better opportunity for determining the weight and credit that should be given their testimony than does a court of review, and under such circumstances a court of review will not disturb the findings of the chancellor unless manifestly and palpably wrong, and this is true even though the court of review might be inclined to find otherwise had it been placed in the position of the trial court upon the trial of the case. (Hall v. Pittenger, 365 Ill. 135; Widmayer v. Davis, 231 Ill. 42.)

We have carefully considered all of the evidence, including the questionnaires and answers thereto in the insanity proceeding, and we cannot say that the finding and judgment of the trial court is against the manifest weight of the evidence.

Therefore the judgment of the trial court is affirmed.

Affirmed.

considered the testimony of Mrs. Tupper and Mrs. Tupper.

The next contention of the district is that the trial

court admitted improper evidence on behalf of the defendant in that such court permitted, over objection, lay witnesses to express their opinions as to the mental condition and ability of defendant to transact ordinary business on August 30, 1935. These witnesses testified to facts showing they had a close acquaintance and had frequently talked with and observed the deceased within a reasonable

time of the date in question. It is our opinion that the trial court did not abuse its discretion in admitting such witnesses to

so testify, and that there was no error in the admission of such

testimony. (Galt v. Roberts, 303 Ill. 78.)

The remaining contention of the defendant is that the

finding and judgment of the trial court is against the manifest weight of the evidence. Where the chancellor receives the evidence in open court and sees the witnesses and hears their testimony, he has a better opportunity for determining the weight and credit that should be given their testimony than does a court of review, and under such circumstances a court of review will not disturb the findings of the chancellor unless manifestly and palpably wrong, and this is true even though the court of review might be inclined to find otherwise had it been placed in the position of the trial court upon the trial of the case. (Hill v. Sittman, 333 Ill. 135.)

Widmayer v. Davis, 331 Ill. 43.)

We have carefully considered all of the evidence, in-

cluding the questionnaires and answers thereto in the instant proceeding, and we cannot say that the finding and judgment of the trial court is against the manifest weight of the evidence.

Therefore the judgment of the trial court is affirmed.

Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1945

Term No. 42020

Agenda No. 19

FRED McCUAN and EUTHA
McCUAN, his wife,
Plaintiffs-Appellants,
vs.
ANTHONY CLARO,
Defendant-Appellee.

Appeal from the
Circuit Court of
Saline County

CULBERTSON, P. J.

319 I.A. - 20²

This is an appeal from a judgment in the amount of \$200.00 entered in the Circuit Court of Saline County, in favor of FRED McCUAN and EUTHA McCUAN, his wife, Appellants (hereinafter called plaintiffs), and against ANTHONY CLARO, Appellee (hereinafter called defendant).

This case was tried before the Court, without the intervention of a jury. The evidence discloses that this was a suit brought by plaintiffs to recover damages which they contend accrued to them by reason of the failure on the part of defendant to comply with the terms of a certain oil and gas lease entered into by and between the plaintiffs herein and the defendant, under date of July 22, 1941. The oil and gas lease in question appears in evidence.

The evidence discloses that at the same time the lease was signed, a draft and agreement was entered into, in the amount of \$1,000.00, which draft was made payable to the order of plaintiffs herein, and which draft and agreement bears the signatures of the plaintiffs herein, as the drawers of said draft, and also bears the signature of the defendant herein. In said agreement



the drawers agree to forward at once with this draft a complete abstract of title to the lands involved in this litigation, and further agree that the drawee shall have eight days after the arrival of the lease and abstract at the collecting bank, in which to have the title examined by an attorney, and in case any objections are found in the title, the drawers shall be furnished with such objections in writing and shall have blank days thereafter to correct the same.

The oil and gas lease, and the draft and agreement, must be read and construed together as one instrument (GARDT vs. BROWN, 113 Ill. 475; ALEXANDER vs. LOEB, 240 Ill. 454; NELSON vs. COLE, GROVE & CO. STATE BANK, 354 Ill. 408).

The evidence in this case discloses that the draft was sent to the City National Bank at Centralia, Illinois, and that there accompanied said draft an abstract of title to the premises sought to be leased. When this abstract arrived at the Centralia Bank, its arrival was brought to the attention of the defendant herein, and he, in turn, caused the same to be brought to the attention of his attorneys. No written objections to the title were ever furnished the plaintiffs herein by the defendant herein, or anyone acting for him. The abstract was returned to the plaintiffs sometime later than eight days after its receipt by the Bank to which it had been sent, and when returned to plaintiffs by the Bank, they were advised by a notation appearing in evidence as Plaintiffs' Exhibit 4, and dated July 30, 1941, as follows, "Mr. Claro will contact the McCuans direct."

The plaintiffs' complaint alleges full performance on their part under the contract with the defendant, and defendant, by his answer, made only a general denial of plaintiffs having fully complied with their obligations under the contract, and failed in his answer to allege facts showing wherein there was failure on the part of plaintiffs to perform. This type of

general denial to a complaint is a violation of Rule 13 of the Supreme Court Rules, and is treated by the Courts as an admission of performance of conditions precedent in the contract (MOORE vs. SCHOEN, 313 Ill. App. 367; ENLOE vs. AMERICAN FAMILY PROTECTION, INC., 291 Ill. App. 623).

The record in this case shows full performance on the part of the plaintiffs herein and we believe the proper measure of damages in case of the breach of this contract is the agreed price of said real estate leased (GRAY vs. MEFK, 199 Ill. 136; WOLLENBERGER vs. HOOVER, 346 Ill. 511).

We are, therefore, of the opinion that the action of the Trial Court in awarding damages only in the amount of \$200.00 was erroneous, and said action being erroneous, the same is hereby reversed and judgment is hereby entered in this Court in favor of Plaintiffs and against Defendant for One Thousand Dollars (\$1,000.00) and costs.

Reversed and Judgment entered here.

FILED

JUN - 1 1943

Minnie H. Mallett
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

May Term, A. D. 1943

Term No. 43F4

Agenda No. 8.

ROY RIEVELY,

Plaintiff-Appellee,

vs.

SOUTHERN ILLINOIS SCRAP
IRON & METAL COMPANY, a
Corporation,

Defendant-Appellant

Appeal from the

City Court of

Harrisburg.

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CULBERTSON, P. J.

319 I.A. 21

This is an appeal from a judgment of the City Court of Harrisburg, in the sum of \$375.00 and costs of suit, in favor of ROY RIEVELY, Appellee (hereinafter called plaintiff), as against SOUTHERN ILLINOIS SCRAP IRON & METAL COMPANY, a Corporation, Appellant (hereinafter called defendant).

The judgment resulted from a de novo trial in the City Court of Harrisburg, on an appeal from a court of a Justice of the Peace in Harrisburg, Plaintiff's action was to collect a commission which he claimed was due him as the result of the sale of a certain trolley locomotive on behalf of defendant Company, which sale was never completed. It was the contention of plaintiff that he was the agent of defendant, selling various equipment on a commission basis, but in the case before the Court, his contention was that he had a special agreement whereby he was to sell the locomotive, which was priced at \$1,000.00, \$600.00 of which was to be paid in cash, and that the defendant was to accept two battery locomotives for the balance of the purchase price of the trolley locomotive. When the locomotive which was being sold on behalf of the defendant Company was delivered to the prospective purchaser obtained by plaintiff, the purchaser refused

to accept it unless certain changes and repairs were made in the locomotive. Defendant refused to make any such changes, and as a result thereof the sale was never consummated.

It is the contention of plaintiff that he had a special agreement for commission in this matter, and that he and the manager of the defendant Company, who testified in the Justice Court case (but who had died prior to the trial in the City Court) had entered into a contract by the terms of which the plaintiff and the defendant Company were to divide equally between themselves the amount received for the battery locomotives. Plaintiff's contention was that he was entitled to receive one-half of the value of the battery locomotives which were valued at a total of \$750.00.

On the trial in the City Court, plaintiff was not permitted to testify to any conversations which occurred as between plaintiff and the deceased manager, but the Justice of the Peace before whom the case was tried originally, testified in part to the nature of the testimony given by the deceased manager at the trial in the Justice Court.

It is the contention of the defendant that no special agency agreement had been proven; that there was no proof that defendant knew or agreed to the changes and repairs to the locomotive, as promised by plaintiff, and that there was no proof that the defendant Company was responsible for the refusal of the Blue Ribbon Coal Company to accept the locomotive. Defendant, at the close of the evidence, moved for judgment in its favor and now contends that the Court erred in not entering judgment in favor of defendant, and as against plaintiff.

It is fundamental that any person claiming under a contract must show that he has been in no default in his own performance, and before an agent can recover from his principal for commission on a sale which was never consummated, he must show that he has taken all necessary steps to complete the sale



and that he himself is without fault for the failure, and that the principal is at fault.

In an action such as is before us in the instant case, by an agent as against his principal for compensation, the burden of proving the terms of the contract, including compensation, is on the agent, and an agent is not entitled to his commission until he can show that he has procured a purchaser ready and willing to purchase on terms as fixed by the principal (KAHN vs. McCREADY, 180 Ill. App. 325), and a Court will not compel a party to do something in performance of a contract which he did not undertake to do in the contract (SCHMIDT vs. BARR, 333 Ill. 494).

In the instant case the only testimony which has been permitted to stand upon which a recovery as against the defendant could be based, was that of the Justice of the Peace in the Court below. There is nothing in such testimony which justifies the conclusion that plaintiff has discharged his obligations of proving a special agency and of proving, specifically, the contract which plaintiff contends he had with defendant Company. The only statement made by the Justice of the Peace in connection with the contract was that the deceased manager had stated the price of the machine which was to be sold, and that the trade was to "follow through." There was no showing of any undertaking to make any changes in the locomotive so as to permit the consummation of the sale. We must, therefore, conclude that the record is wholly deficient in making out a case on behalf of plaintiff, under the law of this State with reference to special agency, which imposes a burden on plaintiff in such case to establish specifically the contract referred to, and the showing that the defendant was at fault in failing to comply with the terms of the contract. The motion of the defendant for judgment in its favor in the Court below should have been granted.



This cause will, therefore, be reversed and judgment will be entered here in favor of defendant, and as against plaintiff, for costs of this suit, and in bar of action.

Reversed, and judgment
entered here.

FILED
JUN - 1 1943

Marion H. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1943

Term No. 42013

Agenda No. 16

W. G. FORTNER,

Plaintiff

vs.

W. JOE HILL, Circuit Judge
Defendant

Original

Petition for
Mandamus

BRISTOW, J.

319 I.A. 21

W. G. Fortner, as plaintiff, on June 20, 1942, filed in this court, his verified, original petition for Mandamus against the defendant, the Honorable W. Joe Hill, one of the presiding Judges of the Circuit Court for the Second Judicial Circuit of Illinois. The petition prays this court to issue the writ of Mandamus against the defendant, directing him, forthwith, to certify and approve a correct Report of Proceedings in a certain cause heard before him as trial judge, in the Circuit Court of White County, Illinois.

The petition recites that a judgment was rendered against the petitioner in said cause January 31, 1941, and that notice and proof of service of notice of appeal was filed April 25, 1941; that praecipe for record was filed April 26, 1941; and that a certified trial court record on June 12, 1941 was filed in this court by petitioner. Complaint is made that at conclusion of the hearing some 600 exhibit papers, by permission of the trial court, were retained by the attorney of opposing party in the trial court; that such attorney had refused to permit petitioner's attorney to copy or examine such exhibits until July 31, 1941, when said trial court entered an order that said



exhibits be lodged with the circuit clerk of said trial court. Said exhibits were deposited August 5, 1941. The petition states that on October 13, 1941, petitioner's attorney presented to opposing counsel for inspection and approval a copy of a report of proceedings and that said opposing counsel evaded and refused to approve such copy, and that on October 16, 1941, petitioner's attorney presented same to respondent for approval which respondent refused to approve and certify on the ground that since exhibits had not been copied by the official reporter, respondent did not know whether same were correct copies and without stipulation of counsel, same would not be approved. The petition states that on May 15, 1942, a motion supported by affidavits was presented to respondent requesting him to certify a report of proceedings that had been tendered to him at Mount Vernon, Illinois, and said petition stated that said tendered report for approval contained all of the original exhibits. The petition further recited that there was a hearing on the motion and at the hearing objection was made by opposing counsel that a part of the testimony of one witness was omitted, but that no other objection was made, and that respondent denied the motion and refused to certify although petitioner agreed that the evidence claimed to have been omitted would be added. The petition further stated that on June 12, 1941, the petitioner presented a motion to this court to extend the time for filing of report of the proceedings in said cause to September 25, 1941, which was granted; that further extensions by this court were made to October 20, 1941, then to November 25, 1940, evidently meaning 1941, and recited that, on November 25, 1941, on motion of petitioner this court entered an order extending generally, time to file report of proceedings. The petition is lengthy and contains numerous statements of opinions and arguments. The above is substantially the facts alleged therein.



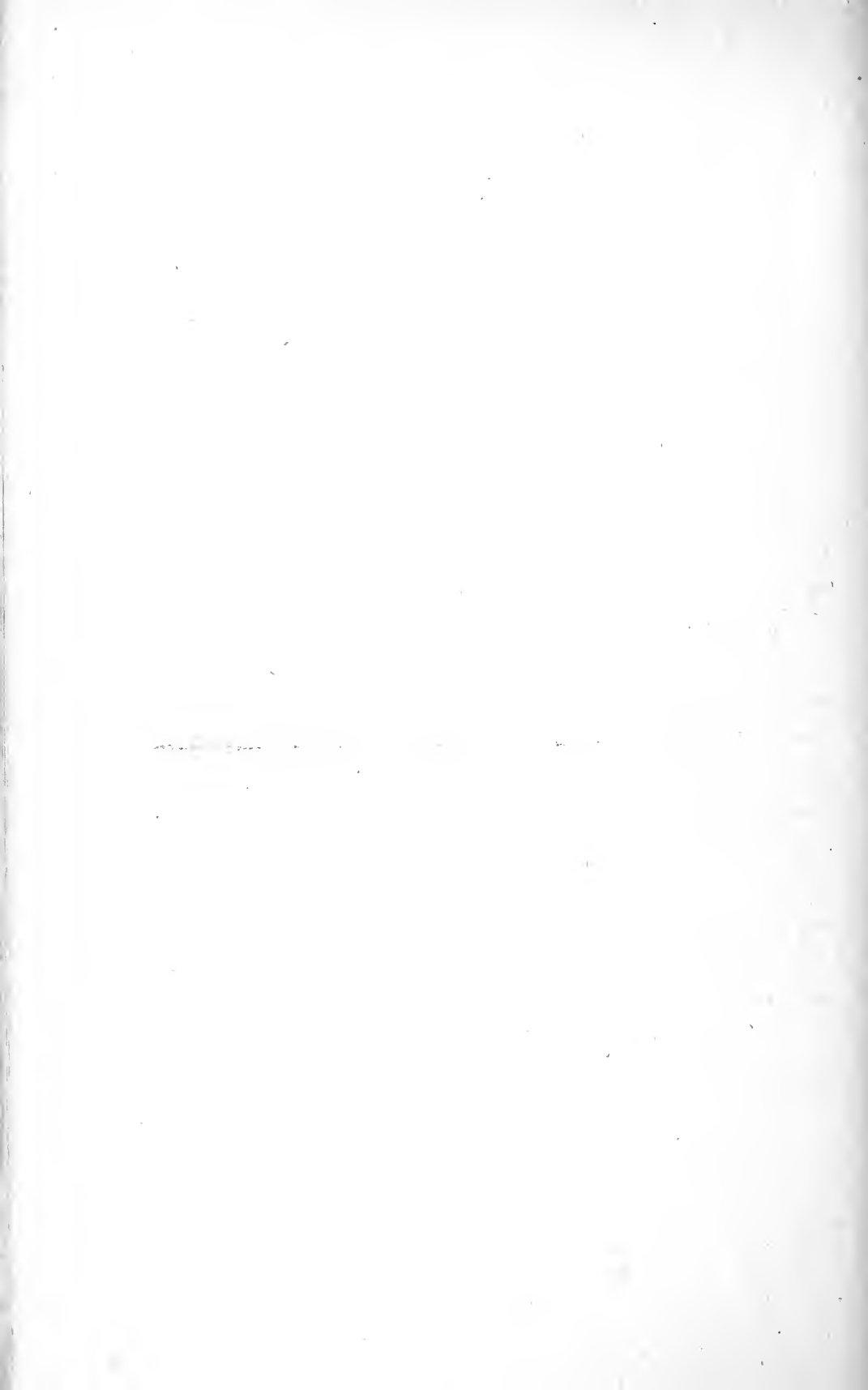
On July 17, 1942, defendant filed his verified answer to the petition, admitting a number of allegations therein contained and denying others and, under oath, recited at length his version of the hearings and proceedings, which in many particulars contradicted the statement of facts set forth in the plaintiff's petition. To his answer, was attached as exhibit "A" the full stenographic report of all of the proceedings, testimony under oath, statements by counsel and court on the hearing on said motion of May 15, 1942, which exhibit "A" covers in detail statement of contention of all parties and facts bearing on the question in issue. This cause is submitted to this court upon said petition, answer and exhibit.

A full, explicit and candid explanation is made by respondent, of many facts showing the reason he had refused to approve and certify documents tendered to him. When the purported transcript was presented to him first, it contained no certificate of the court reporter that it was correct, and it did contain the original exhibits. The court refused to approve same as correct without a showing by the court reporter that same was correct. The court refused further to certify same on the ground that the use of such original exhibits had not been authorized by any order of court or stipulation of counsel. The undisputed record sustains the verified statement of defendant that such were the grounds of his refusal in October 1941. It appears further that the finding against plaintiff was made February 6, 1941.

The answer denied personal knowledge of preparation and filing of record in this court and orders entered therein, and averred that same were not in conformity with the Statute and Rules of Court. The answer alleged, and the facts conclusively show, that no motion to impound exhibits was ever presented to respondent and no order to impound same had ever been entered;



denied that the court had ever entered any order which denied petitioner access to said exhibits; and averred that delay, fault, and negligence of petitioner's counsel was the cause of having no approval of report of the proceedings; and that such delay, and fault consisted in failing to have the official court reporter make a full transcript of the proceedings, by failing to submit to the trial judge, within fifty days after filing notice of appeal, a proper report of proceedings, by failing to make to respondent or to some other judge in said circuit, application for extension of time for filing a report of the proceedings as prescribed by law. The answer further alleges that respondent, at all times, was available. The answer further alleges that petitioner and his attorney had pursued a studied course to evade presentation of report of the proceedings for more than a year after the filing of the notice of appeal. The answer stated that hearing on the motion of May 17, 1942, was held May 22, 1942, and on said last date there was presented to the court the same document as a report of the proceedings which had been presented to the court October 16, 1941. It alleged that on said last date, same had been presented to him in another county where he was actively engaged in trial work and had been presented by another attorney for petitioner; that respondent then refused to certify and approve same because there was no certificate of the court reporter that it was correct; that no notice had been given to opposing counsel or approval by opposing counsel had; and that the other attorney for plaintiff was advised that opposing counsel should have an opportunity to be heard; and that original exhibits should not be incorporated. It further alleges that an affidavit shows that the document was presented to opposing counsel very shortly after October 16, 1941, and that from said date for a period of more than seven months and until May 15, 1942, no effort was made to present to the respondent any



document for approval as report of the proceedings.

The answer further stated that after a full hearing under oath on May 22, 1942 of said motion, it appeared conclusively that no report of proceedings was ever presented to respondent or to any judge of said circuit within fifty days after the filing of notice of appeal, and that at no time had any application for extension of time for the filing of such report of proceedings been made to respondent, herein, or to any judge of said circuit. The answer denied that plaintiff was entitled to Mandamus because respondent, when said purported report was presented to him, was without authority to certify same; that the delay from October 16, 1941, was an attempt to use respondent and the Appellate Court as an instrument of delay in violation of rules and statutes; that respondent knew of no law authorizing use of original exhibits in a transcript instead of copy thereof, in the absence of order of court or stipulation to so use same; that Rule 36 of the Supreme Court and Rule 1 of said Circuit Court, which was identical, and the statutes have been deliberately evaded by petitioner.

The transcript of record containing documents, testimony and statements of admissions, conclusively shows the facts to be those stated in the verified answer of defendant which we have set up in detail.

Exhibit "A" is 91 pages in length, and gives verity to the allegations appearing in the answer. It would serve no good purpose to make a detailed recitation of the contents of Exhibit "A". It shows that continuous objections were made by opposing counsel to the use of original exhibits, in the transcript of the report of the proceedings. It shows that on October 18 or 19, 1941, the transcript was presented to opposing counsel, and that, then, the opposing counsel wrote a letter to plaintiff's attorney stating and pointing out in detail a number of reasons why he did



not agree to same as correct. Copy of the letter under oath of Judge Conger appears in the record. It showed objections because there was no certificate of the reporter or anyone else, that it was correct; that objections were made because original exhibits were incorporated instead of copy thereof, as required by law, that there was no stipulation to use original exhibits; that counsel must insist that the law be followed; that the original exhibits were needed in the conduct of the business of the opposing party. It appears that the exhibits were a part of the records and files of the banking business of the plaintiff in the original suit, on whose behalf judgment had been entered. The letter further requested that he be notified should application be made to the court to approve and certify the document. The letter and testimony of Judge Conger was given under oath and stands undenied. His testimony further showed the document formerly presented to Judge Conger was a copy and not the original to which signature of the trial judge was later sought.

This record further shows that at the hearing on May 22, 1942, counsel for petitioner presented copy of suggestions and affidavit and motion made in this court upon which he obtained an order extending the time to file report of the proceedings. It shows that he reported to this court that the necessity was because of the absence of the trial judge from the jurisdiction of the court and that the petitioner needed more time than the rule would permit a trial judge to grant; and that, since attorney for plaintiff resided in Chicago, it was not practicable for him to present an application for extension of time to defendant or some other circuit judge in the circuit. It now appears from the answer of the respondent, and the hearing of the motion of May 15, 1942, that respondent was not out of the jurisdiction and that there were available other trial judges in the circuit. The record conclusively shows that at all times respondent was

available, and to him, application for extension of time for filing of the report of proceedings could have been made within such fifty day period.

The burden is upon the plaintiff in this proceeding.

Mandamus is not a writ of right, and no intendments can be indulged in to support the issuance of such a writ. The one seeking it must show unqualifiedly his clear right to the writ. *People vs. Blair*, 292 Ill. 139; *Quernheim vs. Asselmeier*, 296 Ill. 494; *Murphy vs. City of Park Ridge*, 298 Ill. 66. If it is doubtful whether a person has, by law, the right to do the act or not, the writ will be denied. *People vs. Forquer*, Breese 104; *People of the State of Illinois vs. Azias M. Hatch*, 33 Ill. 9; *People vs. Kohlsast*, 168 Ill. 37. Mandamus will not lie to compel performance of an act respondent has no authority or duty to perform, and allegations in an answer not denied, are admitted. *The People vs. Lueders*, 287 Ill. 107; *The People of the State of Illinois vs. Ozias M. Hatch*, 33 Ill. 9; *Klokke vs. Stanley*, 109 Ill. 192. It cannot be used as a substitute for an appeal, and cannot be used to correct judicial error. *The People vs. LaBuy*, 305 Ill. 11.

We are of the view that since there was no report of proceedings in proper form, containing copies of exhibits instead of the originals, presented to the respondent to approve and certify, this court is amply justified in holding that the writ of mandamus should be denied in this case. Transcript of proceedings required by the Civil Practice Act, Sec. 74 (2) is in lieu of the Bill of Exceptions, provided by the former Practice Act. *Suttles vs. Zimmerman*, 287 Ill. App. 316. It has long been held that original exhibits cannot be incorporated as part of a bill of exceptions, but that copy thereof must be used. *Pinkerton vs. Pinkerton*, 209 Ill. App. 393, 396; *Martin vs. Todd*, 211 Ill. 105, 108.

The record in the case, we feel, well substantiates the claim urged by respondent that petitioner has been grossly dilatory



and negligent in his methods of delay, which amount to laches. Without any plausible reason, he delayed action in the matter from October until May. It is not the duty of the trial court nor of the opposing counsel to make copies of exhibits and insert them in a transcript in place of the originals so that there may be constituted a legal and proper report of proceedings. After specific objections were made to petitioners faulty transcript, he did nothing about it for seven months. This delay appears most unreasonable and inexcusable, especially when we consider that during this lapse of time, the judgment entered by the trial court against petitioner remains uncollected and the questions lodged against its validity undetermined.

There are a few other legal objections made to this petition but we deem a consideration of same unnecessary. The prayer of the petition for Mandamus should be and same is denied, and the petition should be and same hereby is dismissed.

WRIT DENIED. PETITION DISMISSED.

JUN - 1 1943

Wm. H. H. H. H.
DEPT. OF JUSTICE
RECORDS & COMM. DIV.

Abstract



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1943

395
Agenda No. 11

Term No. 42031

CHRISTINE WILLIAMS,
Plaintiff-Appellee,
vs.
ALTON WATER COMPANY, a
Corporation,
Defendant-Appellant.

69
Appeal from the
Circuit Court of
Madison County,
Illinois.

STONE, J.

319 I.A. 221

Appellee, Christine Williams, hereinafter called the plaintiff, brought an action at law against appellant, the Alton Water Company, a Corporation, hereinafter called the defendant, to recover damages for injuries alleged to have been sustained as a result of stepping in a hole in a sidewalk, in Alton, Illinois, on August 11, 1941.

The complaint alleged in substance that defendant was engaged in operating and maintaining a water supply system, in Alton, and prior to August 11, 1941, had made several excavations in a sidewalk, that defendant negligently failed to properly repair this said sidewalk, and allowed it to remain open, and failed to erect any barricade or install any lantern or warning device at night; that on the night in question plaintiff, while carrying her three year old child in her arms, and while in the exercise of due care for her own safety, fell into the excavation and sustained injuries, and that she suffered a miscarriage.

Defendant in its answer admitted the making of the excavations, but denied any negligence in the filling or repairing of the same, denied that it was allowed to remain open and in a

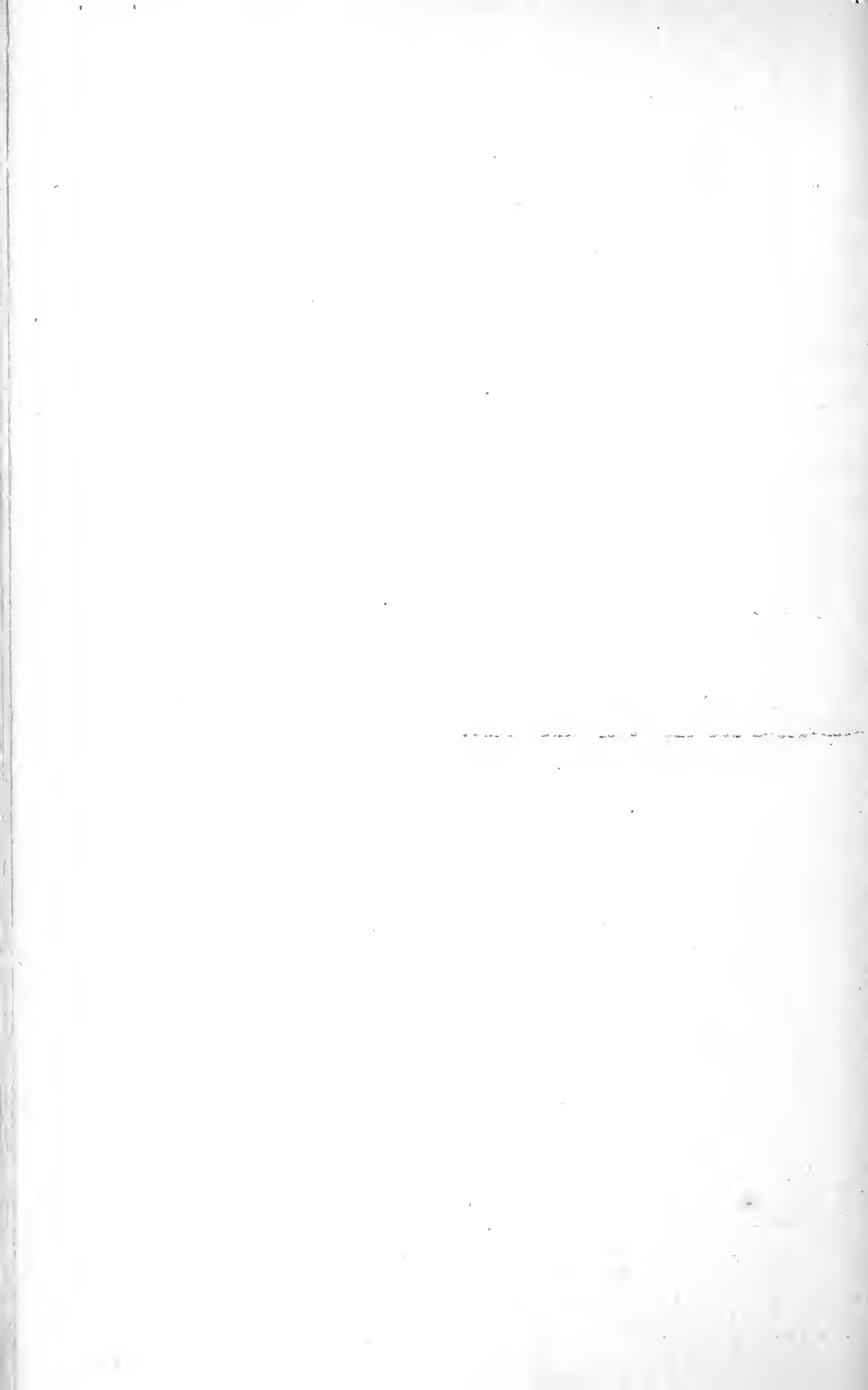
dangerous condition, denied failure to erect barricades, or install lanterns or other warning devices, denied generally that plaintiff fell into the excavation, and in the alternative, if she did fall and sustain injuries, it was through her lack of ordinary care.

The case was tried before a jury, who returned a verdict of \$2000.00 in favor of plaintiff. After motion for new trial was argued, the court rendered judgment for \$1000.00 upon plaintiff entering into a remittitur for a like amount.

Principal errors relied upon for reversal are, that the verdict was based upon perjured testimony, and the court erred in not granting a new trial; that the verdict is clearly against the manifest weight of the evidence, that it is so grossly excessive as to indicate passion and prejudice and was not cured by the remittitur, and that the judgment entered by the court is grossly excessive.

Plaintiff testified that at about eight o'clock on the evening of the day in question, while on her way to a night ball game and while carrying her three year old child in her arms, she stepped off into this hole and fell on her baby. She claimed that the sidewalk was dark, and that there was no light or barricade there. At the insistence of her nine year old son, who also accompanied her, she went on to the ball game but suffered so from her alleged injuries sustained, that she returned home. She further testified that later that night she began having hemorrhages, and miscarried.

Plaintiff is corroborated in part by the witness, Flora Smith, who lived upstairs in the house occupied by plaintiff in that she met plaintiff, when the witness was on her way to the ball game, near the scene of the accident, and that plaintiff's dress was wet and muddy. She further testified that she later saw her about one o'clock the following morning, and that she was standing in a pool of blood.



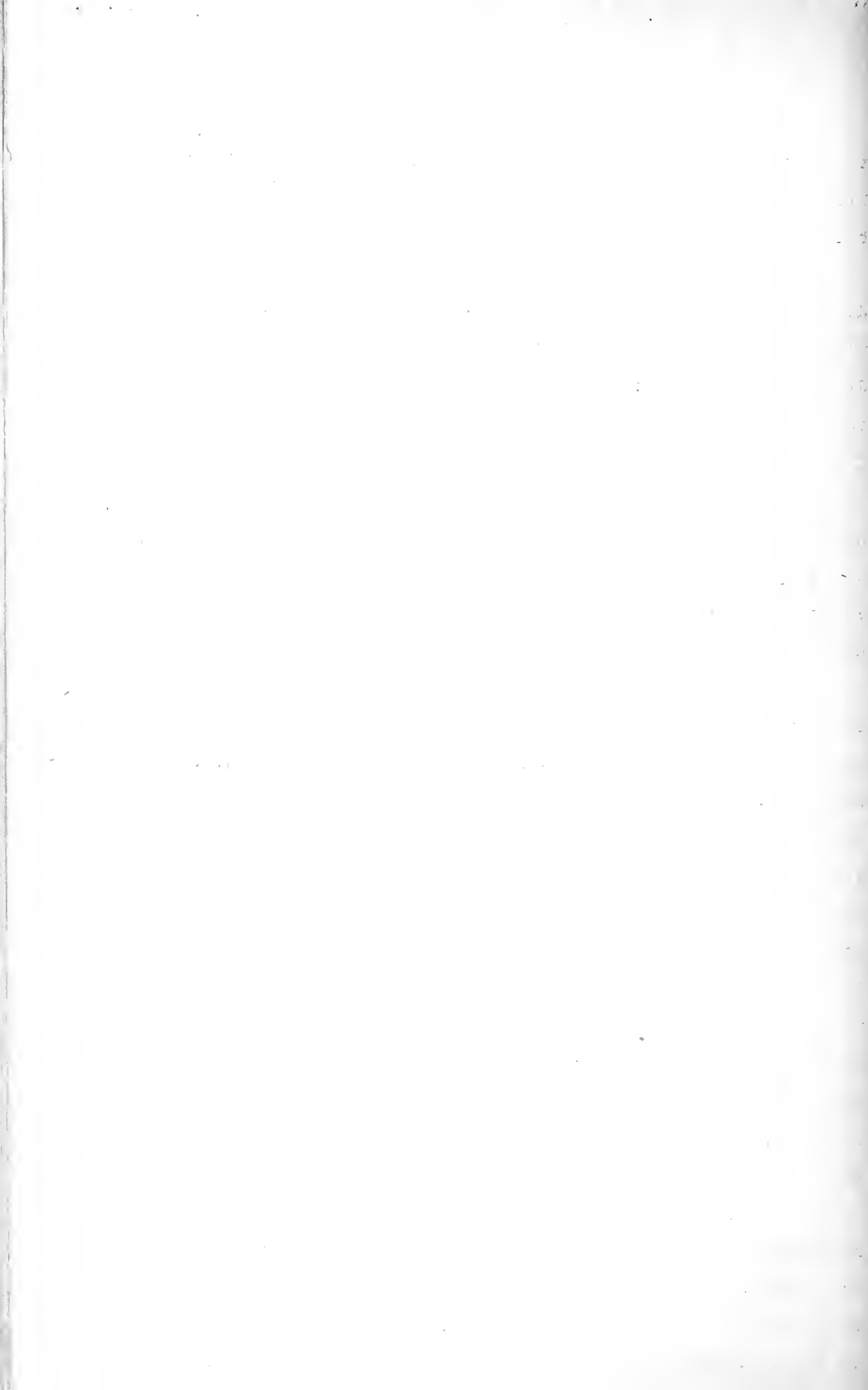
Leo Hesse, a mail carrier, whose route took him over the street where the accident happened, testified that while there had been warning signals and barricades, about the 11th of August, the excavation was filled and the barricades were removed; that thereafter it rained and caused a settling, and that there was a hole there on August 11th and there was no warning present at that time.

Dr. Paul J. O'Neill testified that he visited plaintiff professionally on the 14th of August and that he would say definitely she had been pregnant; that plaintiff and her husband gave a history of a miscarriage and such examination as he was able to make substantiated this.

On behalf of defendant, two employees, and two ex-employees testified in substance that there were barricades and lanterns at the site of the excavation and that bricks had been laid on the excavation and that they were solid.

Plaintiff was asked by her attorney, on direct examination if she had ever had any other miscarriage beside the present one, and she replied that she had not. On cross-examination, she repeated this denial and added that she had never had any trouble with her female organs, nor had she had any female trouble before August 11, 1941, the date of her alleged fall. Dr. W. W. Billings, physician, called as a witness for the defendant, testified to three occasions when he treated plaintiff for abortions or miscarriages.

Upon this controverted question, it is strenuously urged by counsel for defendant, that the verdict was based upon perjured testimony, and that the court erred in not granting a new trial; that plaintiff was conclusively impeached with respect to her condition, and her testimony, not having been corroborated by competent evidence should have been disregarded. This, of course, is necessarily predicated upon the theory, that the testimony of

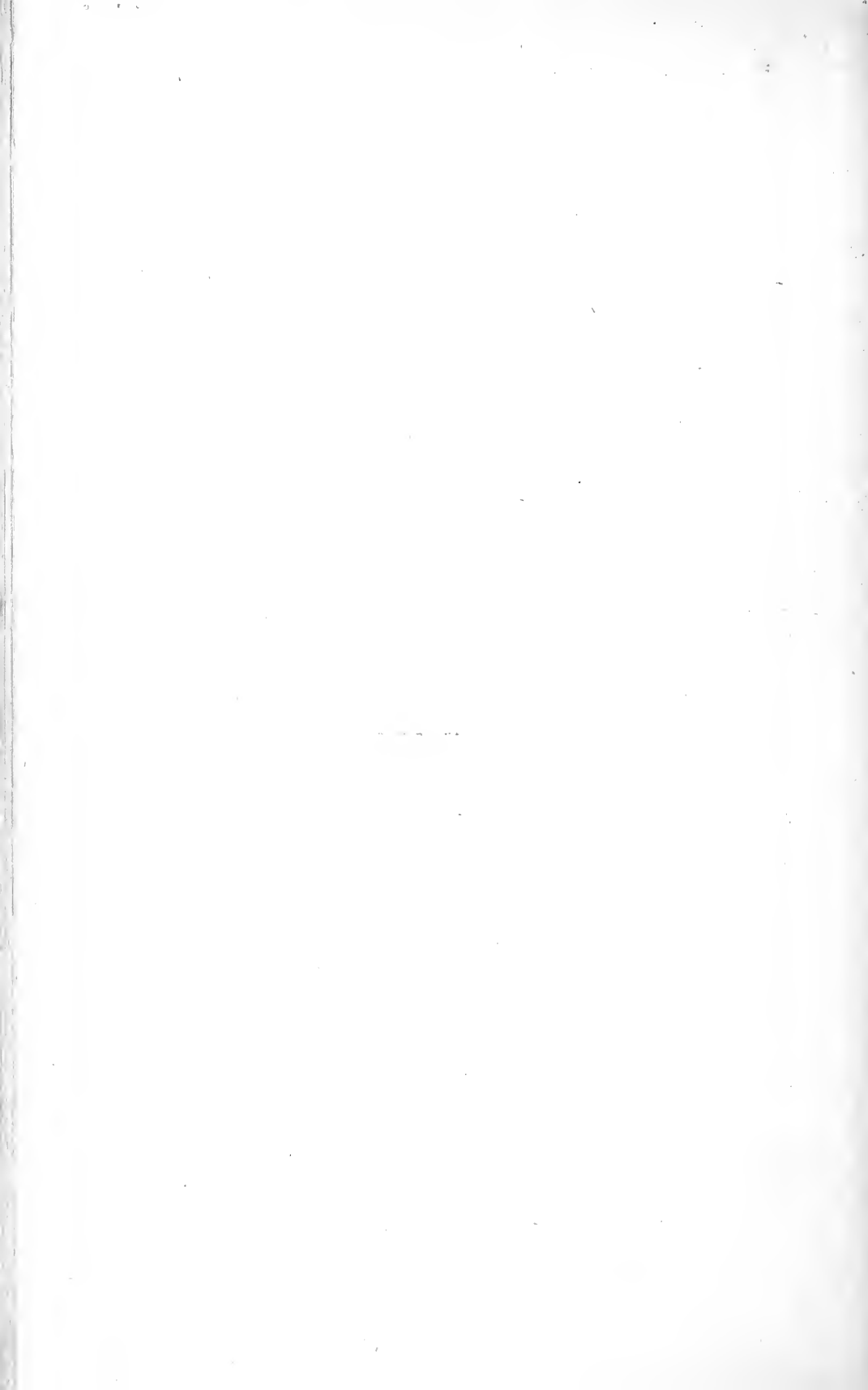


the witness Billings was true. The jury saw and heard both Mrs. Williams and Dr. Billings testify, and apparently saw fit to believe the former.

Practically all of the cases cited by counsel for defendant, on the theory of perjured testimony, are cases where a motion for a new trial was involved, on the ground that newly discovered evidence disclosed such perjury, and have no application to the instant case. Particularly in the case of Seward vs. Cease, 50 Ill. 228, cited by defendant, the witness testifying admitted his perjury, and made oath that upon a new trial he would retract all his testimony so falsely given. This, however, was presented in a bill in chancery filed to obtain a new trial at law, alleging that the judgment at law was recovered solely upon the perjured testimony of this one witness.

In the instant case, there is merely a conflict in the evidence, on this controverted question of fact, as between two witnesses, all of which was submitted to the triers of fact. It was the province of the jury to weigh the evidence and determine the credibility of witnesses, and this court will not substitute its judgment for the verdict of the jury unless the evidence is clearly insufficient to support the verdict. People vs. Merritt 367 Ill. 521; Schollabarger vs. Nattier 289 Ill. App. 473. In the event of a conflict in the testimony, an appellate tribunal will not set aside the verdict of a jury, unless it is satisfied that the verdict is manifestly against the weight of the evidence. Avey vs. Medaris 272 Ill. App. 207; Haynes vs. Century Coal Co. 171, Ill. App. 83. We are not inclined to so hold, on the record before us.

The fact that there was a remittitur of \$1000.00 does not establish the fact that the verdict was the result of passion and prejudice. The practice of filing a remittitur is well established in this state and such a remittitur is not to be taken as a concession that the jury was actuated by passion or prejudice.

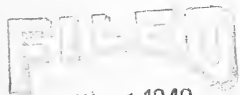


Stumer vs. Pitchman 22 Ill. App. 399; aff'd. 124 Ill. 250;
Fitzpatrick vs. California and Hawaiian Sugar Ref. Corp. 309 Ill.
App. 215.

In the case of North Chicago Street R. R. Co. vs. Shreve,
there was a verdict in the trial court in the sum of \$5000.00,
based upon a miscarriage resulting from an injury. A remittitur
of \$3000.00 was made and judgment against defendant was entered
in the sum of \$2000.00 which the Appellate Court held was not
excessive. In the case of Mills vs. Oquawka 200 Ill. App. 119,
a verdict of \$2000.00 based upon a miscarriage, was held not
excessive. We are not inclined to the belief that the judgment
of \$1000.00 entered by the Court was excessive, and finding no
reversible error in this record, the judgment of the Circuit
Court will be affirmed.

AFFIRMED.

Abstract



Mamie H. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1943.

Term No. 43F2.

Agenda No. 6.

396

INEZ GUESS, Administratrix of
the Estate of CHARLES URAL
GUESS, deceased,

Plaintiff-Appellee,

vs.

NEW YORK CENTRAL RAILROAD
COMPANY, a Corporation,

Defendant-Appellant

Appeal from the
Circuit Court of
Pulaski County

67 027

313 A.A. 222

STONE, J.

This is an action for wrongful death, brought by Inez Guess, Administratrix of the Estate of Charles Ural Guess, deceased, appellee, who will be hereinafter referred to as plaintiff, to recover damages for the death of her husband, because of the alleged negligence of the New York Central Railroad Company, a corporation, appellant, who will be hereinafter referred to as defendant. Plaintiff's intestate was killed by a collision with a freight train operated by defendant, while driving a motor truck up to and across a railroad crossing at the Village of Olmsted, Pulaski County, Illinois, on December 26, 1941.

The case was tried upon complaint and answer, before a jury, who returned a verdict of \$3000.00 in favor of plaintiff. At the close of plaintiff's testimony, defendant offered a motion for a directed verdict, which was denied by the Court. Motion for a directed verdict was not made at the close of all of the testimony. After verdict defendant filed its motion in the alternative for judgment notwithstanding verdict, and for a new trial, which motions were denied by the court and judgment entered

against defendant, from which judgment it brings its appeal to this court. The only error relied upon for reversal is, that the trial court erred in refusing to direct a verdict for defendant and in refusing to enter judgment notwithstanding verdict.

It appears from the record that the main track of defendant railroad company extends in a general north and south direction through the Village of Olmsted, and is straight for about one half mile north of the crossing where the accident occurred, that west of the main track at the point of accident, is a switch track and a house track, each about six or eight feet apart; that the street crossing where the accident happened is the main travelled route from State Highway #37 into the Village of Olmsted and crosses the railroad tracks at a slight angle bearing from southwest to northeast and is paved with macadam or black top; that there was standing at that time on the west or house track a box car estimated by various witnesses at from 35 to 87 feet from the street. A rick of cord wood from six to eight feet high variously estimated at from 40 to 100 feet from the street, was situated west of the box car, along the right of way. A school bus was parked south of the box car, estimated at from 10 to 20 feet from the street.

On the day in question at about four o'clock in the afternoon a twenty-three car freight train of defendant company came into Olmsted, travelling from north to south, scheduled to pass through the village without a stop. Its speed is variously estimated at from twenty to thirty or forty miles an hour. Plaintiff's intestate, driving a Chevrolet pick-up truck, collided with the train, the speed of the truck being estimated at twenty to twenty-five miles an hour. Practically all of the eye witnesses, both for plaintiff and defendant testify that the whistle was blown, while most of them testified negatively, that they paid no attention to, or did not notice the bell ringing. The widow testified that deceased was thirty-seven years of age, had good

hearing and that his eye sight was good. There were skid marks on the pavement, turning toward the south, at about the west track, which would be about seventeen feet from the point of impact with the on-coming train.

The record shows that an automobile driven from the east, going in a westerly direction, on the same street, passed in front of the train, narrowly escaping being struck, and that then the train collided with the truck, resulting in injuries to plaintiff's intestate from which injuries he died several days later.

Clarence Britt, a witness for plaintiff testified that the cord wood, box car and bus would obstruct the view to the north. Harry H. Goins, called for plaintiff testified that the conditions there would have prevented him, (plaintiff's intestate) from seeing the train. Ernest Adams, witness for plaintiff testified that the bus, wood and box car would interfere with a person's view looking north, if he were coming from the west going east. This witness also mentioned the car going west, passing along side plaintiff's intestate, just before he got to the track as tending to obstruct his view. Ray Goins, also a witness for plaintiff testified that the box cars (he testified that there were two), the bus and the wood, would obstruct the view.

It is not claimed on behalf of defendant, that the jury was improperly instructed, or that the court erred in the admission of, or exclusion of evidence, or that the verdict is excessive. It is argued for defendant that plaintiff's intestate, at the time of the injuries sustained by him, which resulted in his death, was not in the exercise of due care and caution for his own safety. This is the sole question raised, as ground for reversal of the judgment, by this court.

Provisions of the Civil Practice Act permitting the trial court to give judgment in favor of either party notwithstanding verdict where, under the evidence in the case, it would have been the duty of the court to direct a verdict, do not change

the common law rule as to when the evidence is insufficient to authorize granting of such a motion; and the court must consider all the evidence in the light most favorable to the non-moving party to determine whether there is any evidence to support his allegations, having no authority to weigh and determine controverted questions of fact. Capelle vs. Chicago and N. W. Ry. Co. 280 Ill. App. 471; Illinois Tuberculosis Ass'n. vs. Springfield Marine Bank 282 Ill. App. 14; McCarthy vs. Rorrison 283 Ill. App. 129; McNeil vs. Harrison and Sons, Inc. 286 Ill. App. 120; Gardiner vs. Richardson 293 Ill. App. 40. The trial court in passing upon this motion would have no authority to weigh and determine controverted questions of fact, since it is only where there is no evidence as a matter of law to sustain plaintiff's claim, that judgment notwithstanding verdict may be entered. Wolever vs. Curtiss Candy Co. 293 Ill. App. 586.

It is argued on behalf of defendant that there is absolutely no evidence contradicting the fact that plaintiff's intestate drove his truck on to the crossing at a speed of twenty-five miles an hour until he was upon the west track, and that that fact standing alone would be sufficient to show that he did not act with such care and caution for his own safety as a reasonable person in the same circumstance would have acted. It is further claimed that had Guess looked he could have seen the train approaching for a distance of some 100 feet west along the highway from the crossing. In the case of Chicago and Northwestern Railroad Co. vs. Hansen, 166 Ill. 623, the Supreme Court said, "The traveler may not be in fault in failing to look or listen if misled without his fault, or the view may be obstructed by objects or by darkness, and other and louder noises may interfere with his hearing. It seems to us impossible that there should be a rule of law as to what particular thing a person is bound to do for his protection in the diversity of cases that constantly arise,

and the question what a reasonably prudent person would do for his own safety under like circumstances must be left to the jury as one of fact." The evidence showed that the view of the motorist approaching the tracks from the west, was obstructed by the wood pile, the box car, or cars, and the school bus, as well perhaps as the car travelling in the opposite direction. There is some evidence to the effect that there was considerable downgrade going west from the tracks, thus placing plaintiff's intestate on much lower ground, than that on which the cordwood, bus and box car or cars stood as he travelled eastward toward the tracks, rendering it more difficult for him to see over them to detect the approach of the train. It is not a rule of law that the omission of the duty to look and listen will bar a recovery where there are facts excusing the performance of that duty, and it cannot be said, as a matter of law, that a person is in fault in failing to look and listen, if misled without his fault or where the surroundings may excuse such failure. C & A R R Co. vs. Pearson 184 Ill. 386; Penn Co. vs. Frana 112 id. 398; Chicago and Northwestern Ry. Co. vs. Dunleavy 129 id. 132;

The jury were to determine, as a question of fact, in view of all the surroundings whether the deceased was guilty of contributory negligence. The witness, Ernest Adams, testified that he heard the brakes squeak and looked and saw the truck wheels turn south, as the train struck the truck. There was evidence of skid tracks for a distance of about 17 feet to the point of impact. Whether these things indicated a use of proper care under the circumstances, once deceased had discovered his danger, and if previously his view of the approaching train had been obstructed by the cordwood, the box car or cars, and the school bus, were questions for the determination of the jury.

In view of the fact that it is not the province of a court of review to weigh the evidence and determine controverted

facts, nor of the trial court to do so, in the first instance, on motion to enter judgment notwithstanding verdict, we are constrained to find that there is no reversible error in this record, and that the trial court did not err in not allowing the motion to enter judgment notwithstanding verdict. The judgment of the Circuit Court of Pulaski County, will therefore be affirmed.

AFFIRMED.

Abstract

FILED

JUN - 1 1943

James H. Mallett

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
May Term, A. D. 1943

Term No. 43F7

Agenda No. 10

JOHN SKARHA,

Plaintiff-Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
for the Use of Randolph County,
Illinois, DAVID N. CONN,
State's Attorney of Randolph
County, Illinois, LOUIS BEASLEY
and EDWARD C. ZULLEY,

Defendants-Appellees.

Appeal from the

Circuit Court of

Randolph County,

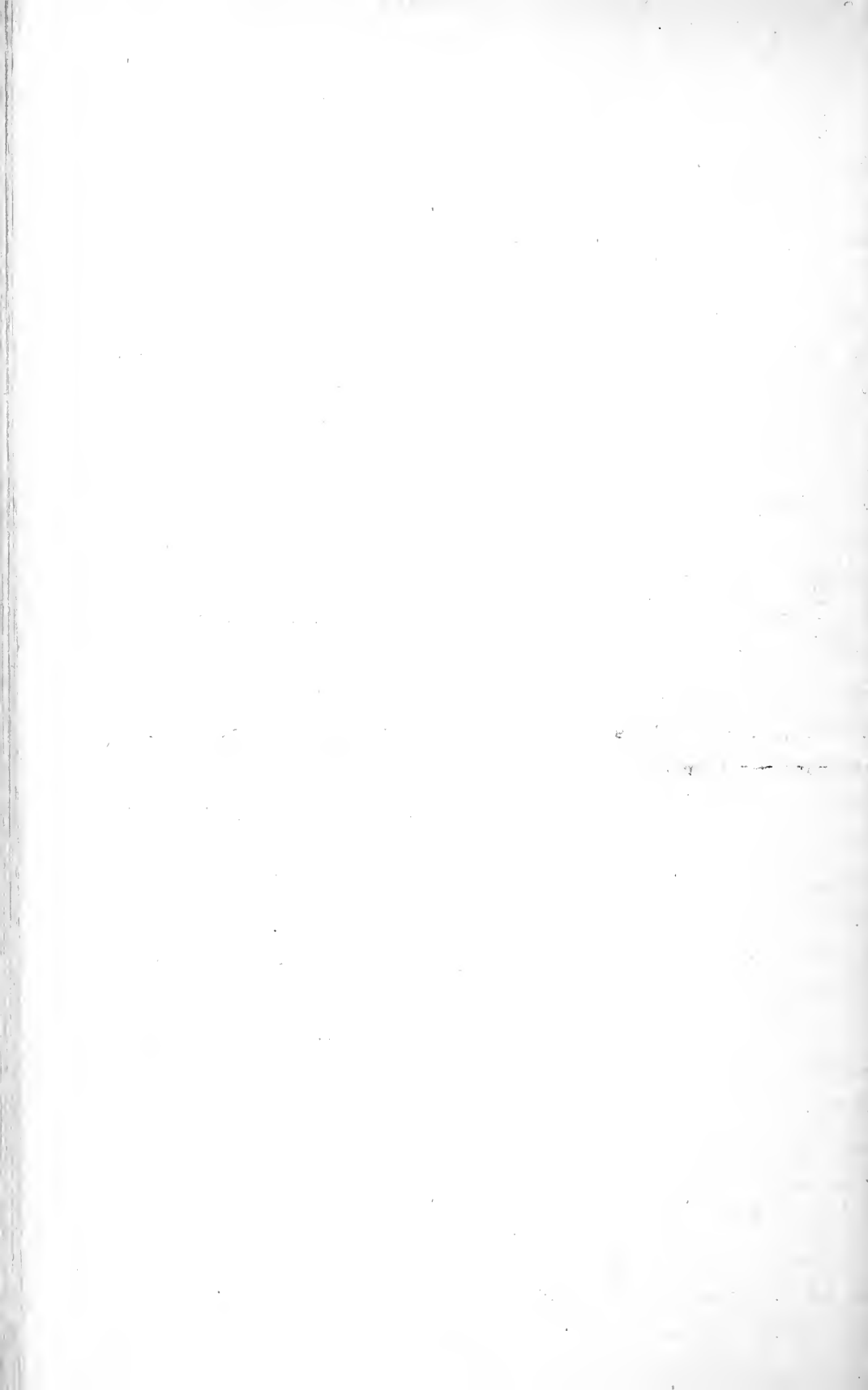
Illinois.

319 I.A. 523

STONE, J.

This is a suit for injunction, filed in the Circuit Court of Randolph County, whereby John Skarha, appellant, who will be hereinafter referred to as plaintiff, sought to restrain Randolph County, David N. Conn, State's Attorney of Randolph County, and Louis Beasley and Edward C. Zulley, attorneys, appellees, who will be hereinafter referred to as defendants, from prosecuting a creditor's suit, filed on November 27, 1941, and pending in the Circuit Court of St. Clair County against plaintiff, John Skarha and others, based on a judgment for Five Thousand Dollars rendered on March 1, 1937, by the Circuit Court of Randolph County, in favor of the People of the State of Illinois for the use of Randolph County.

It appears that the judgment entered in Randolph County in 1937, was based on the forfeiture of a recognizance, which was given in a fugitive from justice proceeding, on which plaintiff was surety. Proceeding thereafter, and using said judgment as a base, the County of Randolph, the State's Attorney thereof, and



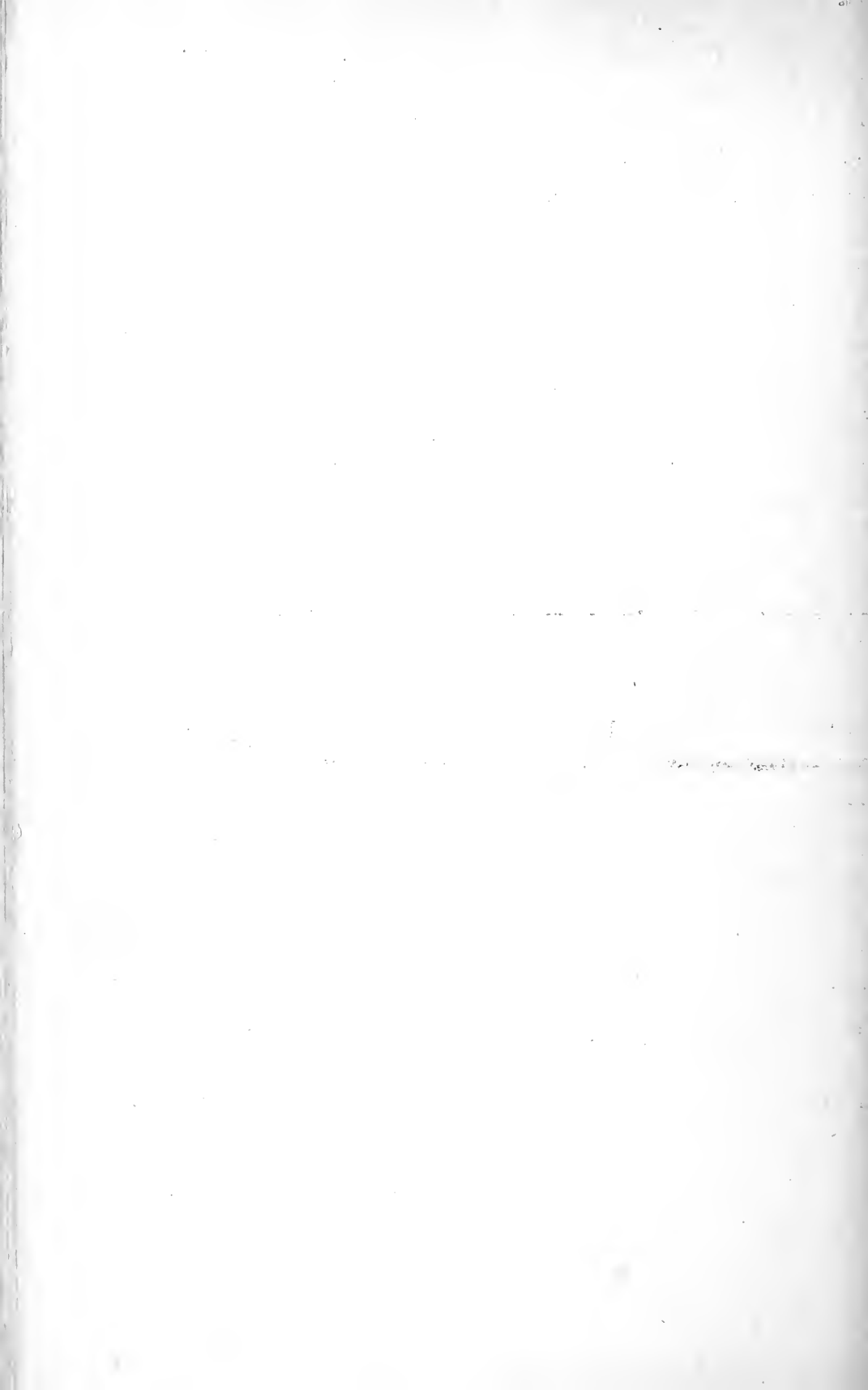
others, filed a suit in the nature of a creditor's bill, in the Circuit Court of St. Clair County, to discover assets of John Skarha.

The grounds for the injunction stated in the complaint were, that the State's Attorney of Randolph County had no right to appoint Louis Beasley and Edward C. Zulley, as assistant State's Attorneys, and were not authorized to bring creditor's suit before the Circuit Court of St. Clair County; that Randolph County had no authority to obtain judgment against plaintiff John Skarha, for Five Thousand Dollars, and therefore had no right to bring creditor's suit in the Circuit Court of St. Clair County; that the suit is embarrassing to the plaintiff and others, whose property is sought to be subjected to the payment and satisfaction of the judgment against Skarha. The prayer for relief was that defendants be restrained and enjoined from further prosecuting said suit in St. Clair County. However, no writ of injunction was applied for and none was issued.

To this complaint defendants appeared specially and filed a verified motion to dismiss the cause at plaintiff's cost. A number of reasons were set forth therein, the principle one of which was that the trial court was without jurisdiction to enjoin the proceedings pending before the Circuit Court of another county, in the same Circuit, both proceedings being in chancery.

Defendant's motion to dismiss, so verified together with exhibits and plaintiff's verified complaint, were duly submitted to the court, who allowed defendant's motion and entered judgment against plaintiff, dismissing the cause, at plaintiff's cost, from which order plaintiff prosecutes his appeal to this court.

It is assigned as error relied upon for reversal that the trial court erred in finding that it did not have jurisdiction to proceed because of the pendency of the suit in St. Clair County. The statute with reference to the granting of injunctions to stay



a suit or judgment provides as follows: "When an injunction shall be granted to stay a suit or judgment at law, the proceeding shall be had in the county where the judgment was obtained, or the suit is pending; but the writ may be sent in the first instance into any county in this state where the defendants reside". Sec. 4, Ch. 69, Ill. Rev. Stats, 1941; 109.352 Jones Ill. Stats Ann. In the case at bar the proceeding sought to be enjoined was the creditors bill, filed in St. Clair County. The injunction suit was filed in the Circuit Court of Randolph County. The fact that the original judgment was in the Circuit Court of Randolph County was immaterial. The primary relief sought in the injunction suit was that defendants be restrained and enjoined from further prosecuting said suit in St. Clair County.

In this state the Circuit Court of one county has no power to supervise the judgments and decrees of the Circuit Court of another county. Where the Circuit Court of one county acquired jurisdiction of the parties and the subject matter of a suit before the filing of a bill in another county, it cannot be enjoined by the court of the latter county from proceeding with the hearing of such suit. Brinkerhoff vs. Huntley, et al., 223 Ill. App. 591; Friedberg vs. DePew 200 Ill. 395; Garretson vs. Appleton Mfg. Co. 61 Ill. App. 443. We are therefor constrained to hold that the Circuit Court of Randolph County had no jurisdiction to issue the injunction prayed for.

This question of jurisdiction is so clearly decisive that we do not deem it necessary to consider, in this opinion, other questions alleged as grounds for reversal. The trial court did not err in dismissing the suit at plaintiff's costs, and the judgment of the Circuit Court of Randolph County will be affirmed.

Abstract

AFFIRMED.

JUN - 1 1943

3.

W. H. H. H. H.
CLERK OF THE COURT



STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

May Term, A. D. 1945

Term No. 43F17

Agenda No. 16.

MARGARET VIEDENSCHKEK,

Plaintiff-Appellant

vs.

JOHNNY PERKINS PLAYDIUM, INC.,
A Corporation,

Defendant-Appellee.

-Appeal from the

City Court of

East St. Louis

STONE, J.

This is an appeal by Margaret Viedenschek, plaintiff-Appellant, (hereinafter called plaintiff) from an order of the City Court of East St. Louis, allowing amended motion of Johnny Perkins Playdium, Inc. a corporation, defendant-appellee (hereinafter called defendant) to vacate a judgment entered against defendant in that court, on February 19, 1942.

On January 16, 1942, plaintiff filed her complaint, consisting of three counts, asking damages in the sum of \$2500.00 which complaint charged in substance that defendant was a corporation engaged in the operation of a bowling alley and tavern in the city of East St. Louis; that on July 15, 1941, plaintiff was lawfully, at the invitation of defendant, in the said tavern; that she was in the exercise of due care and caution for her own safety; that defendant had the duty of keeping the tavern in a reasonably safe condition; that defendant violated such duty by carelessly and negligently failing to light the tavern properly and by reason whereof plaintiff caught her foot in a bracket and was thrown to the floor and sustained injuries. It was also charged as negligence that defendant failed to provide sufficient space between the stools at the bar of the tavern.



Defendant was served with summons on January 25, 1942, and thereafter failed to answer, plead or otherwise enter its appearances and a default was entered against it, on February 18, 1942. On February 19, 1942, the Court assessed plaintiff's damages and entered a judgment in favor of plaintiff and against defendant in the sum of \$1,250.00. On March 30, 1942, execution was served on defendant. On April 1, 1942, defendant filed a motion to set aside the judgment and to quash service, such motion being filed more than thirty days after judgment had been entered. On April 8, 1942 plaintiff filed her motion to dismiss defendant's motion heretofore filed. On April 11, 1942, defendant filed an amended motion to vacate default judgment which motion set forth in substance that defendant's failure to answer was not due to any failure of defendant to exercise diligence, setting forth in that regard that "defendant's failure to appear in said court and file an answer therein was not due to any failure on behalf of the defendant to exercise diligence in its own behalf, and that defendant believed and was convinced that a full legal defense would be presented in its behalf, and that the rights of the defendant would be fully protected in this suit;" that defendant and its officers did not know that a default judgment had been entered against it until March 30, 1942, thirty-nine days after judgment had been entered; that defendant had a meritorious defense to the cause of action; that the rules of court of the City Court of East St. Louis, provided that in all cases where judgment is obtained by default, the testimony shall be taken down by the Court reporter, which plaintiff failed and neglected so to do; that plaintiff having previously demanded trial by jury, did not waive such trial by jury at the time default was taken, and that the order of court did not show that defendant was called in open court as required by law.

It was agreed that all motions and answers thereto be presented at one hearing. On October 9, 1942, the Court entered

an order setting aside and vacating the judgment, and from this order plaintiff prosecutes her appeal to this Court.

It is assigned as error relied upon for reversal, that the trial court was without jurisdiction to set aside the judgment, and that the court erred in setting aside said default judgment. Where more than thirty days have elapsed, as in the instant case, since the rendition of the judgment, the only proceeding available to set aside the judgment is a proceeding under Section 72 of the Practice Act. *Seitner and Cherry Co. vs. Board of Education* 283 Ill. App. 392; *People vs. Thon* 374 Ill. 624; *Cramer vs. Commercial Men's Ass'n.* 260 Ill. 516; *McCord vs. Briggs and Turivas*, 249 Ill. App. 516.

The function of a motion under said Section, such as made by defendant is to bring to the attention of the Court and to obtain relief upon errors of fact, such as death of either party pending suit, or infancy, where the party was not properly represented by guardian; or coverture when the common-law disability still exists; or insanity at the time of trial; or a valid defense existing in the facts of the case but which without negligence on the part of the defendant, was not made, either through duress or fraud or excusable mistake, these facts not appearing on the face of the record and being such as, if known in time, would have prevented the rendition and entry of the judgment. *People v. Noonan*, 276 Ill. 430, 1.c.p. 437; *Marabia vs. Thompson Hospital*, 309 Ill. 147 1.c. 152; *People v. Bruno*, 345 Ill. 449, 1.c. 452; *People v. Ogbin*, 368 Ill. 173, 1.c. 175; *Linehan v. Travelers Insurance* 370 Ill. 157; *People v. Thon*, 374 Ill. 624, 1.c. 629; *Chapman v. North American Insurance Co.*, 292 Ill. 179.

We find nothing in this record, as set forth in defendant's amended motion, that would bring this case, within the rule as above stated. The record shows that on the 25th day of January, 1942, process of summons was served on Roy Bruder, vice-presi-

dent of defendant corporation. Nowhere does defendant attempt to explain why it failed to appear and defend the suit against it, and the statement that "the defendant believed and was convinced that a full legal defense would be presented in its behalf and that the rights of the defendant would be fully protected in this suit", is far from any showing of due diligence required by the law. In order to have shown due diligence, there should have been a showing as to why the action was not defended and a detailed statement of the facts constituting the excuse. *Edwards vs. McKay*, 73 Ill. 570. The statement that a full legal defense would be presented in its behalf, seems to be an allegation of a conclusion, and a dependance upon some vague third person, to present the defense for defendant. It is fundamental that diligence is a personal matter, and can hardly be delegated.

It is contended on behalf of defendant, that the complaint filed by plaintiff is insufficient, and will not support a judgment, even in default, and therefore the court did not err in setting aside the judgment. This appeal is from the order of court setting aside and vacating the default judgment entered. The issue made, therefore, and the judgment sought concern only the setting aside of the original judgment entered. *People vs. Green*, 355 Ill. 468; *Jacobson vs. Ashkinage*, 337 Ill. 141. We are not called upon to pass upon the sufficiency of the original pleading, for the issues herein involved are distinct from the principal suit, and the judgment rendered is a separate judgment.

It is earnestly contended on behalf of defendant, that defendant was entitled to a hearing before a jury, and that defendant's right to a trial by jury was specifically preserved until such time as the plaintiff waived her right to trial by jury. By introducing evidence and submitting the case to the Court, without a jury, plaintiff waived the jury trial theretofore demanded by her. *Harris v. Juenger* 289 Ill. App. 467; *Midland Contracting Co. vs. Toledo Foundry and M. Co.* 154 Fed. 797. Under Section 64 of the Practice Act, in order to obtain trial

by jury, after plaintiff had waived such trial, defendant would have to make its motion at the time of such waiver to obtain a trial by jury. This, of course was not done, and we find no merit in this contention.

It is also claimed by defendant that the court did not err in setting aside the default judgment, for the reason that the rules of court required that the testimony in a default judgment should be taken down by the Court reporter. The fact that a court may have entered a default judgment without observing rules of the court which were of record does not constitute an error of fact, as courts take judicial notice of their own records and such records are always constructively before the Court. Cramer vs. Commercial Men's Ass'n. 260 Ill. 516; Pisa vs. Rezek, 206 Ill. 344; Waldron vs. Tarpey, 234 Ill. App. 287; McNulty vs. White, 248 Ill. App. 572.

The defendant herein, having permitted judgment to be taken against it, and not having shown in its motion, that it had a valid defense existing in the facts of the case, but which without negligence on the part of defendant was not made either through duress or fraud or excusable mistake, these facts not appearing on the face of the record, and which, if known, would have prevented the rendition of the judgment, the trial court was not justified in allowing the motion to set aside the default judgment heretofore entered. The court having erred in doing so, the judgment of the City Court of East St. Louis is hereby reversed, and the cause will be remanded, with directions to deny the motion of defendant to vacate and set aside the judgment.

REVERSED AND REMANDED WITH DIRECTIONS.

FILED

JUN - 1 1943

5.

Thomas H. Mallott
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract



42515

JOSEPH PALAGGI,

~~Appellant,~~

v.

CATHERINE NEWMAN and R. B. TANNER,

~~Appellees.~~

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

319 1.A. 24

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for defendants entered on the verdict of a jury, as directed by the court, at the close of the evidence. Defendant Newman is the owner of premises known as 1839 Indiana Avenue in Chicago. Defendant Tanner is the agent of Catherine Newman, who negotiated a lease with the plaintiff of these premises. The lease was executed May 22, 1940, by Catherine Newman to Joseph Palaggi and Theresa Palaggi, his wife, as lessees. The lease provides the premises are to be used as a boarding house. The term of the lease is from July 1, 1940, to the 30th day of June, 1942, at a rental of \$75 per month. The lease contains the usual covenants, among which are that the lessees have examined and know the condition of the premises and received the same in good order and repair, that no representations as to the condition and repair of the same have been made prior to the execution of the lease; further, that the lessees will keep the premises in good repair, and lessor shall not be liable for any damages occasioned by a failure to keep the same in repair.

On the south side of the building, on the outside of it, was a stairway which could be reached through a door from the room on the first floor occupied by the plaintiff. This door opened onto a screened porch. The stairway led down to the yard. It was of wood and about 3 feet wide. Plaintiff lived in this building with his

JOSEPH PALAGGI,

Appellant,

v.

CATHERINE NEWMAN and R. B. TANNER,

Appellees.

APPEAL FROM

SUPERIOR COURT,

CITY OF CHICAGO.

MR. PRESIDING JUSTICE KATHOENT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for defendants entered on the verdict of a jury, as directed by the court, at the close of the evidence. Defendant Newman is the owner of premises known as 1839 Indiana Avenue in Chicago. Defendant Tanner is the agent of Catherine Newman, who negotiated a lease with the plaintiff of these premises. The lease was executed May 22, 1940, by Catherine Newman to Joseph Palaggi and Theresa Palaggi, his wife, as lessees. The lease provides the premises are to be used as a boarding house. The term of the lease is from July 1, 1940, to the 30th day of June, 1942, at a rental of \$75 per month. The lease contains the usual covenants, among which are that the lessees have examined and know the condition of the premises and received the same in good order and repair, that no representations as to the condition and repair of the same have been made prior to the execution of the lease; further, that the lessees will keep the premises in good repair, and lessor shall not be liable for any damages occasioned by a failure to keep the same in repair.

On the south side of the building, on the outside of it, was a stairway which could be reached through a door from the room on the first floor occupied by the plaintiff. This door opened onto a screened porch. The stairway led down to the yard. It was of wood and about 3 feet wide. Plaintiff lived in this building with his

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wife and daughter, Catherine McAuliffe, and her husband.

Early on the morning of October 16, 1940, plaintiff was disturbed by the barking of a dog in the yard. He determined to stop it, opened the door of his room and started down the steps. The second step from the bottom of the stairway broke, and plaintiff was thrown and injured. He had never walked down the stairway before and says he had never seen it; that he looked at the steps as he went down but did not see anything wrong. He says, "I just put my foot on it and boom. I fell - - - the steps broke. I fell on the cement and broke my left knee and my right shoulder." Plaintiff was first taken to Mercy Hospital and afterwards to the Wesley Hospital where an operation was performed by Dr. Kreuscher. His son, Dan Palaggi, was with him when he went to see the building before renting it. He went inside it but did not see the stairway. He moved into the building in June 1940. Plaintiff signed the lease by his mark. His wife also signed it. His son Dan told him to sign it. Plaintiff says the man who brought the lease to him said it didn't mean anything; that he could go into possession any time he wanted to. Plaintiff has lived in Chicago 43 years and has owned buildings which he rented to other people. He says he cannot read. He moved out of the building last year. He did not have any work done on the building after he moved/ⁱⁿexcept cleaning. Plaintiff had been receiving treatment from an eye specialist.

Plaintiff's son Dan testifies he was not present when the lease was signed but went to the property two or three months before his father moved in. He saw the steps before plaintiff moved in but did not pay any attention to them. He says, "Before the accident the steps appeared okay to me." He examined the steps after the accident and saw a piece broken off the second step from the bottom. The piece was about a foot and a half to two feet long. There was a new break along the middle part of it. It appeared to be in a rotten condition and had been there for quite some time. He says, "The inner part was sort of rotten, and the outside was a new break." He called an ambulance and had his

wife and daughter, Catherine McAnillite, and her husband.

Early on the morning of October 18, 1940, Plaintiff was disturbed

by the barking of a dog in the yard. He determined to stop it,

opened the door of his room and started down the steps. The second

step from the bottom of the stairway broke, and Plaintiff was thrown

and injured. He had never walked down the stairway before and says

he had never seen it; that he looked at the steps as he went down

but did not see anything wrong. He says, "I lost my foot on it and

boom. I fell -- the steps broke. I fell on the cement and broke

my left knee and my right shoulder." Plaintiff was first taken to Army

Hospital and afterwards to the Wesley Hospital where an operation was

performed by Dr. Kneuecher. His son, Dan Palaski, was with him when

he went to see the building before renting it. He went inside it but

did not see the stairway. He moved into the building in June 1940.

Plaintiff signed the lease by his mark. His wife also signed it. His

son Dan told him to sign it. Plaintiff says the man who brought

the lease to him said it didn't mean anything; that he could go into

possession any time he wanted to. Plaintiff has lived in Chicago 43

years and has owned buildings which he rented to other people. He says

he cannot read. He moved out of the building last year. He did not have

any work done on the building after he moved except cleaning. Plaintiff

had been receiving treatment from an eye specialist.

Plaintiff's son Dan testified he was not present when the lease

was signed but went to the property two or three months before his

father moved in. He saw the steps before Plaintiff moved in but did not

pay any attention to them. He says, "Before the accident the steps

appeared okay to me." He examined the steps after the accident and saw

a piece broken off the second step from the bottom. The piece was about

a foot and a half to two feet long. There was a new break along the

middle part of it. It appeared to be in a rotten condition and had been

there for quite some time. He says, "The inner part was sort of rotten,

and the outside was a new break." He called an ambulance and had his

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father taken to the hospital. His brother-in-law, Timothy McAuliffe, was with him when he looked at the stairway. Dan made the application for his father to rent the building. He never looked at the stairway before the accident and had never been up or down it.

Tim McAuliffe, the son-in-law of plaintiff, says, "I saw the stairway on the south side of the building before the accident. It appeared all right." He looked at the stairs after the accident and says there was a break in the second step from the bottom, a piece two feet long was off the center. It was corroded in the center, but on the ends you could see it was a fresh break.

Catherine, the daughter of plaintiff and wife of Tim, testified she was living with her father at the time he got hurt. She went downstairs and found her father unconscious at the bottom of the stairs and went upstairs to tell her mother. She used the same stairway. She did not look at the broken step until about three hours afterward, when she saw it was broken and rotted.

This is, we think, a fair statement of the facts in the case. The evidence certainly fails to sustain the allegations of the complaint that defendants "at the time of leasing the premises to the plaintiff and for a long time prior thereto, knew of the dangerous and unsafe condition of the stairway alongside of the building and of the latent defect of the steps of said stairway and fraudulently and wilfully concealed said knowledge of the latent defects of said step and steps of stairway from the plaintiff on and before the leasing of the premises." There is not a scintilla of evidence tending to sustain these allegations of the complaint,

While citing other cases plaintiff seems to rely particularly upon two; namely, Smith v. Morrow, 220 Ill. App. 627, 630, and Woods v. Lawndale Enterprises, Inc., 302 Ill. App. 570. In the Smith case plaintiff's intestate died as a result of injuries sustained when a balustrade, or balcony, which was a part of a porch used in common by tenants and of which the landlord retained control, gave way. There

father taken to the hospital. His brother-in-law, Timothy McAniff, was with him when he looked at the stairway. Dan made the application for his father to rent the building. He never looked at the stairway before the accident and had never been up or down it.

Tim McAniff, the son-in-law of plaintiff, says, "I saw the stairway on the south side of the building before the accident. It appeared all right." He looked at the stairs after the accident and says there was a break in the second step from the bottom, a piece two feet long was off the center. It was crowded in the center, but on the ends you could see it was a fresh break.

Catherine, the daughter of plaintiff and wife of Tim, testified she was living with her father at the time he got hurt. She went downstairs and found her father unconscious at the bottom of the stairs and went upstairs to tell her mother. She used the same stairway, she did not look at the broken step until about three hours afterward, when she saw it was broken and rotted.

This is, we think, a fair statement of the facts in the case. The evidence certainly fails to sustain the allegations of the complaint that defendants "at the time of leasing the premises to the plaintiff and for a long time prior thereto, knew of the dangerous and unsafe condition of the stairway alongside of the building and of the latent defect of the steps of said stairway and fraudulently and wilfully concealed said knowledge of the latent defects of said step and steps of stairway from the plaintiff on and before the leasing of the premises." There is not a scintilla of evidence tending to sustain these allegations of the complaint.

While citing other cases plaintiff seems to rely particularly upon two; namely, Smith v. Morrow, 220 Ill. App. 627, 630, and Wood v. Lawndale Enterprises, Inc., 302 Ill. App. 570. In the Smith case plaintiff's intestate died as a result of injuries sustained when a balustrade, or balcony, which was a part of a porch used in common by tenants and of which the landlord retained control, gave way. There

4.

was evidence tending to show the ends of the rails had decayed, and that nails by which the rails were attached had rusted, etc. The trial court instructed the jury to return a verdict for defendant and entered judgment accordingly. The Appellate Court reversed the judgment and remanded the cause, saying that there was a question for the jury. The opinion also said that a latent defect was not limited to a defect hidden from sight but also included a defect hidden from knowledge. In the Woods case the plaintiff, who was an employee of defendant's tenant, was injured when an overhead light globe fell upon him while he was putting a screen in a transom to the entrance way to a stair and a part of the building of which the landlord had retained control. A judgment for the plaintiff was reversed, the Appellate Court saying that it was the duty of the trial judge to have directed a verdict for defendant. Neither of these cases is applicable here. The uncontradicted evidence shows defendant landlord had demised the whole premises and did not retain control of any part of it, while the plaintiff had covenanted to keep the place in repair, and that he had received it in good condition. Both suits were by third parties while here one of the lessees brings the suit.

The court did not err in directing the verdict. The judgment will be affirmed.

AFFIRMED.

O'Connor, J., concurs.,
Mr. Justice McSurely participated in the decision of this case but passed away before the opinion was filed.

was evidence tending to show the ends of the nails had decayed, and that nails by which the rails were attached had rusted, etc. The trial court instructed the jury to return a verdict for defendant and entered judgment accordingly. The Appellate Court reversed the judgment and remanded the cause, saying that there was a question for the jury. The opinion also said that a latent defect was not limited to a defect hidden from sight but also included a defect hidden from knowledge. In the Wood case the plaintiff, who was an employee of defendant's tenant, was injured when an overhead light globe fell upon him while he was putting a screen in a transept to the entrance way to a stair and a part of the building of which the landlord had retained control. A judgment for the plaintiff was reversed, the Appellate Court saying that it was the duty of the trial judge to have directed a verdict for defendant. Neither of these cases is applicable here. The uncontested evidence shows defendant landlord had demised the whole premises and did not retain control of any part of it, while the plaintiff had covenanted to keep the place in repair, and that he had received it in good condition. Both suits were by third parties while here one of the issues brings the suit.

The court did not err in directing the verdict. The judgment will be affirmed.

APPROVED.

O'Connor, J., concurs.
 Mr. Justice McBurney participated in the decision of this case but passed away before the opinion was filed.

42534

EVA BRYANT,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

319 I.A. 524²

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action brought November 12, 1940, to recover damages for injuries sustained by plaintiff on September 10, 1940, when she fell into a hole in a sidewalk on 44th Place in the City of Chicago, and on trial by jury there was a verdict for plaintiff for \$600, on which the court, overruling motions for a new trial and for judgment notwithstanding the verdict, entered judgment.

The sole contention for reversal is that the statutory notice required to the City of Chicago by Paragraphs 7 and 8, Illinois State Bar Stats, 1941, Chapter 70, p. 1800 is substantially defective and does not meet the requirements of the statute.

The notice is in evidence and is addressed to the Corporation Counsel, City Clerk and City Attorney at the City Hall, naming them. It is designated a "Supplemental Notice". It directs these officials to be informed "that on the 10th day of September, 1940, at about the hour of 8:30 P. M., Eva Bryant, who then resided at 511 East 44th Place, and who now resides at 4920 Forrestville Avenue, Chicago, Illinois, while walking on and along 44th Place at or near St. Lawrence Avenue, thoroughfares in the City of Chicago, Illinois, stepped into a hole, depression, or a broken portion of the said sidewalk on said 44th Place at or near St. Lawrence Avenue, Chicago, Illinois, suffering severe injuries. The injured person was under the care of Dr. Earl L.

EVA BRYANT,

Appellee,

v.

CITY OF CHICAGO, a Municipal Corporation,

Appellant.

MR. PRESIDING JUSTICE WATSON DELIVERED THE VERDICT OF THE COURT.

In an action brought November 12, 1940, to recover damages for injuries sustained by plaintiff on September 10, 1940, when she fell into a hole in a sidewalk on 44th Place in the City of Chicago, and on trial by jury there was a verdict for plaintiff for \$200, on which the court, overruling motions for a new trial and for judgment notwithstanding the verdict, entered judgment.

The sole contention for reversal is that the statutory notice required to the City of Chicago by Paragraphs 7 and 8, Illinois State Bar State, 1941, Chapter 70, p. 1800 is substantially defective and does not meet the requirements of the statute.

The notice is in evidence and is addressed to the Corporation Counsel, City Clerk and City Attorney at the City Hall, naming them. It is designated a "Supplemental Notice". It directs these officials to be informed "that on the 10th day of September, 1940, at about the hour of 8:30 P. M., Eva Bryant, who then resided at 511 West 44th Place, and who now resides at 4920 Forestville Avenue, Chicago, Illinois, while walking on and along 44th Place at or near St. Lawrence Avenue, thoroughfares in the City of Chicago, Illinois, stepped into a hole, depression, or a broken portion of the said sidewalk on said 44th Place at or near St. Lawrence Avenue, Chicago, Illinois, suffering severe injuries. The injured person was under the care of Dr. Earl L.

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Gooden, 559 East 43rd Street, Chicago, Illinois. As a result of the injuries sustained as aforesaid, a cause of action has accrued to the said Eva Bryant and this notice is served pursuant to the Statute in such case made and provided preliminary to the institution of suit against the City of Chicago." The notice is signed "Eva Bryant, Claimant. (By) Clarence M. Dunagan, 188 W. Randolph, Central 6166." It shows the receipt of the Department of Law of the City of Chicago at 3:25 P. M. on December 13, 1940, "Barnet Hodes, Corporation Counsel by E. Larson, Records Section".

On the trial the City objected when this notice was offered in evidence and at the close of the evidence made a motion that the jury be instructed to return a verdict for defendant.

In defense the City called as a witness Salvator Pasquenelli, a registered land surveyor, who identified a map or survey of 44th Place between Vincennes and St. Lawrence Avenue in the City of Chicago. This plat is in evidence as defendant's exhibit No. 2.

Plaintiff on the trial testified that on September 10, 1940, she lived at 511 East 44th Place and is a housewife. On that evening at about 8 o'clock she left her home as it was getting dark. The street lights were on. She went across the street to the house of a friend, Mrs. Schackelford, and about fifteen minutes thereafter with her left for church. The Schackelford house was on the north side of 44th Place. They walked east, plaintiff on the outer side next to the street. They walked past about four houses when plaintiff fell into a hole where the cement was broken up. The hole was on the side of the sidewalk next to the street. It was about a foot wide and 2 feet long and about 3 inches deep. Mrs. Henrietta Schackelford, friend of plaintiff, corroborated this testimony.

The plat shows that No. 520 on East 44th Place is 362 feet west of St. Lawrence Avenue. There are two alleys in the block, one the west, the other the east alley. The east alley is closer to St. Lawrence Avenue than the other. The third house east of the west alley is No. 520. The next house east of No. 520 is No. 522, and the east

• "ПОЛТОРА" 25-го

It is in evidence as defendant's exhibit No. 2.

a testimony.

The plat shows that No. 520 on West 44th Street is 50 feet wide at St. Lawrence Avenue. There are two alleys in the block, one to the east of No. 520, and one to the west of No. 520. The east alley is 10 feet wide, and the west alley is 10 feet wide. The plat also shows that the lot on which No. 520 is located is 50 feet wide at St. Lawrence Avenue and 100 feet deep. The plat also shows that the lot on which No. 520 is located is 50 feet wide at St. Lawrence Avenue and 100 feet deep. The plat also shows that the lot on which No. 520 is located is 50 feet wide at St. Lawrence Avenue and 100 feet deep.

wall of No. 522 is 346 feet west of St. Lawrence Avenue. The west wall of No. 520 is 212 feet east of Vincennes. The sidewalk on the north side of 44th Place averages 6 feet wide. The parkway on the north side between the sidewalk and the curb varies in spots but mainly is 11 feet between the south edge of the sidewalk and the south edge of the curb. At 44th Place, the street proper is about 66 feet wide.

The City cites a large number of cases to the proposition that this notice, as given, was substantially defective. The statute requires that the notice state among other things "the place or location where such accident occurred". In McComb v. City of Chicago, 263 Ill. 510, the Supreme Court of this state approved a statement as to the purpose of this statute: "It was not intended that the terms of the notice should be used as a stumbling block or pitfall to prevent recovery by Meritorious claimants". In Garr v. Ashland, 62 N. H. 665, the Supreme Court of New Hampshire said:

"If the statement so designates the place that the officers of the town, being men of common understanding and intelligence, can by the exercise of reasonable diligence, and without other information from the plaintiff, find the exact place where it is claimed the damage was received, it is in this respect sufficient, because it fully answers the purpose of the statute."

Other cases to the same effect are Reule v. City of Chicago, 268 Ill. App. 266; Youngvert v. City of Chicago, 174 Ill. App. 299; Brenner v. City of Chicago, 182 Ill. App. 348; Schmidt v. City of Chicago, 288 Ill. App. 570.

The purpose of the statute is apparent. It is to give notice from which the City can ascertain who is the injured person, where he or she lives, where the attending physician may be found, etc. It is argued this notice is insufficient to enable the City to find out where the accident took place. We will not assume investigators of the City are dull and inefficient.

The judgment will be affirmed.

AFFIRMED.

O'Connor, J., concurs.
Mr. Justice McSurely participated in the decision of this case but passed away before the opinion was filed.

U'Gonnor, J., concurring.
Mr. Justice Kennedy participated
in the decision of this case but
passed away before the opinion was
filed.

The judgment will be affirmed.

Null and inoffensive.

accident took place. It will not become an investigation of the accident
this notice is insufficient to enable the City to find out where the
lives, where the attending physician may be found, and it is proper
which the City can ascertain in the time allowed, since it is the
The purpose of the statute is to prevent. It is to give notice from

Chicago, 203 Ill. App. 570.

Hanner v. City of Chicago, 184 Ill. App. 48; Wendell v. City of

203 Ill. App. 570; Yonkers v. City of Chicago, 184 Ill. App. 48.

Other cases to the same effect are Wright v. City of Chicago.

"If the statement as furnished was placed in the hands of the officers of the town, being read or copied and circulating and intelligence, can by the exercise of due diligence, and without other information from the plaintiff, find the exact place where it is of such that damage was received, it is in this respect sufficient, because it fully answers the purpose of the statute."

The Supreme Court of New Hampshire said:

recovery by notification claimed. Wendell v. City of Chicago, 184 Ill. App. 48.
as to the purpose of this statute: "It was not intended that the purpose of the notice should be used as a means of making it difficult to prevent recovery by notification claimed. Wendell v. City of Chicago, 184 Ill. App. 48.
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side of 44th place averages 10 feet wide.

Wall of No. 510 is 11 feet 6 inches wide.

Wall of No. 510 is 11 feet 6 inches wide.

42554

319 LA. 395

ROSE KUHN,

Appellee,

v.

CITY OF CHICAGO, a Municipal
Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff lived in Chicago at 3704 North Central Park Avenue, a public street running north and south. Her home was on the west side of the street, and she had lived there for thirty-three years. On the evening of October 5, 1940, at about 6:45 she was walking south on the sidewalk on the east side of this street. When in front of No. 3705 she tripped, or as she puts it, "stumbled my toes on the sidewalk". She fell and was severely injured.

December 2, 1940, she filed suit against the City of Chicago alleging negligence by it in failing to keep the street and sidewalk in a reasonably safe condition. This, she averred, was the cause of her injury. The defendant City answered denying the place where the accident occurred was unsafe and that defendant was negligent or the sidewalk unsafe or dangerous. The answer also denied notice of any defect and averred plaintiff was not in the exercise of due care and caution for her own safety.

There was a trial by jury and at the close of all the evidence a motion by defendant for an instruction in its favor, which was denied. The jury returned a verdict for plaintiff with damages assessed at \$1500. The court, overruling the usual motions for a new trial, etc., entered judgment on the verdict.

The sole defect in the sidewalk at the time in question, as established by the evidence, is that two adjoining slabs were not on

JOSE KUHNS

v.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

Appellee,

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff lived in Chicago at 3704 North Central Park Avenue, a public street running north and south. Her home was on the west side of the street, and she had lived there for thirty-three years. On the evening of October 3, 1940, at about 8:45 she was walking south on the sidewalk on the east side of this street. When in front of No. 3703 she tripped, or as she puts it, "stumbled my toes on the sidewalk". She fell and was severely injured.

December 2, 1940, she filed suit against the City of Chicago alleging negligence by it in failing to keep the street and sidewalk in a reasonably safe condition. This, she averred, was the cause of her injury. The defendant City answered denying the place where the accident occurred was unsafe and that defendant was negligent or the sidewalk unsafe or dangerous. The answer also denied notice of any defect and averred plaintiff was not in the exercise of due care and caution for her own safety.

There was a trial by jury and at the close of all the evidence a motion by defendant for an instruction in its favor, which was denied. The jury returned a verdict for plaintiff with damages assessed at \$1500. The court, overruling the usual motions for a new trial, etc., entered judgment on the verdict.

The sole defect in the sidewalk at the time in question, as established by the evidence, is that two adjoining slabs were not on

2.

a level with each other or the rest of the sidewalk. In the complaint plaintiff alleged defendant was obligated to keep the sidewalk in a reasonably safe condition, and neglecting this duty it permitted part of the sidewalk to remain on an incline, to sink from the building line and permitted a considerable decline of the slab to be and remain in that position. A picture of the sidewalk at the point in question is in evidence. The testimony accurately shows the condition of the sidewalk at the time and place where plaintiff was injured. The picture and other evidence show that the entire length of two slabs of the sidewalk (which was of concrete) adjacent to each other were not on a level, one of these slabs being at least 2 or possibly 3 inches higher than the other. The complaint does not allege the sidewalk was thus constructed. It alleges and the proof tends to show this defect came about through the sinking of one of the slabs after construction. There is no proof of congestion of traffic on this sidewalk, generally or at the particular time of the accident. The picture, justifies an inference the street was not crowded as is the down town district of Chicago at times.

Plaintiff's testimony was to the effect that it was dark at the time she was injured. The nearest street light was about 75 feet away. She had walked over the sidewalk six or seven times before this, but she did not notice it before she fell. Plaintiff had crossed the street to visit with her friend, Mrs. Hunter, and she often did this.

August Novello, a butcher, who lived at 3708 North Central Park Avenue, found plaintiff lying on the sidewalk and helped her up. He says: "One block of the sidewalk seems to be sunk a couple inches below the other. The difference in level is between 2 and 2 1/2 inches. I had noticed that condition existing there before the accident. That condition existed a couple of years at least before that. I ran across the street and recognized that it was Mrs. Kuhn when I was at about the curb." Plaintiff was quite a large woman, weighing 230 pounds.

Frances E. Novello of 3708 North Central Park Avenue said that at the time in question she was sitting in her living room with the door open and heard someone scream. She called her son, and they went over

open and heard someone scream. She called her son, and they went over the time in question she was sitting in her living room with the door August Novello, a butcher, who lived at 3708 North Central Park Avenue, found plaintiff lying on the sidewalk and helped her up. He says: "One block of the sidewalk seems to be sunk a couple inches below the other. The difference in level is between 2 and 2 1/2 inches. I had noticed that condition existing there before the accident. That condition existed a couple of years at least before that. I ran across the street and recognized that it was Mrs. Kuhn when I was at about the curb." Plaintiff was quite a large woman, weighing 230 pounds.

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and tried to pick Mrs. Kuhn up. She noticed the condition of the sidewalk; the south block was raised about 2 inches over the north block. It was around 6:45 P. M. and was dark. There were no lights of any kind reflecting on the portion of the sidewalk where she was lying. The difference in level extended the full width of the adjacent blocks, about 5 feet.

The sole contention of the defendant City is (and we are asked to hold as a matter of law) that the City's failure to repair a difference in level (irrespective of its depth) between two adjoining slabs of a sidewalk does not constitute negligence. There are a number of cases, beginning with City of Chicago v. Bixby, 84 Ill. 82, followed by this court in City of Chicago v. Norton, 116 Ill. App. 570, which would seem to sustain defendant's contention. Much reliance is also placed in a number of New York decisions, Gumbs v. Klovvza, 246 App. Div. 738, 283 N. Y. S. 866, and Griffin v. Town of Harrison, 268 N. Y. 238, 197 N. E. 265, which announce a quite similar doctrine. These cases are reviewed in Bleiman v. City of Chicago, 314 Ill. App. 471, where the Second Division of this court held there being a defect in a driveway consisting of a half inch projection of metal plates over a curb, the question of defendant's liability was of law and that a verdict for the defendant should have been directed.

It is quite impossible to harmonize the authorities in this state on this subject, as will appear from the opinion in Puck v. City of Chicago, 281 Ill. App. 6. However, in Orban v. City of Chicago, 313 Ill. App. 144, this court, in a case which cannot, be distinguished on the facts, held this question was for the jury. What was there said is applicable here.

"Defendant contends it should have been held by the court, as a matter of law, defendant was not guilty of negligence and that a requested instruction to that effect should have been given. In considering this contention plaintiff is entitled to have the evidence with all its just inferences taken in the light most favorable to her. When so considered, we hold the jury might reasonably find the sidewalk was defective and that defendant had constructive notice thereof and was negligent, while plaintiff at and before the time of her injury was in the exercise of due care. The photo-

and tried to pick Mrs. Kuhn up. She noticed the condition of the sidewalk; the south block was raised about 8 inches over the north block. It was around 6:45 P. M. and was dark. There were no lights of any kind reflecting on the portion of the sidewalk where she was lying. The difference in level extended the full width of the adjacent blocks, about 5 feet.

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"Defendant contends it should have been held by the court, as a matter of law, defendant was not guilty of negligence and that a requested instruction to that effect should have been given. In considering this contention plaintiff is entitled to have the evidence with all its just inferences taken in the light most favorable to her. When so considered, we hold the jury might reasonably find the sidewalk was defective and that defendant had constructive notice thereof and was negligent, while plaintiff at and before the time of her injury was in the exercise of due care. The photo-

graphs in evidence show that the defect in the sidewalk was substantial not merely a slight difference in the level of adjoining slabs of concrete, as defendant contends. Any attempt to review the cases (about 60 in number) which are cited in the briefs would require much labor without increasing materially the sum total of judicial knowledge. Graham v. City of Chicago, 346 Ill. 638, cited by defendant, decides the liability of a city for causing the accumulation of artificial ice on its sidewalks. White v. City of Belleville, 284 Ill. App. 322, is a case where the facts were quite similar to those in this case and the decision quite favorable to defendant's view. The Appellate Court was, however, reversed by the Supreme Court in White v. City of Belleville, 364 Ill. 577. The cause was remanded to the Appellate Court with directions to pass on other errors. The Appellate Court then affirmed the judgment, 290 Ill. App. 616. "

We hold that White v. City of Belleville, 364 Ill. 577, and the same case in 290 Ill. App. 616 are decisive here. The judgment for plaintiff will be affirmed.

AFFIRMED.

O'Connor, J., concurs.

Mr. Justice McSurely participated in the decision of this case but passed away before the opinion was filed.

graphs in evidence show that the defect in the sidewalk was substantially not merely a slight difference in the level of adjoining slabs of concrete, as defendant contended. Any attempt to reveal the cause (about 30 in number) which are cited in the briefs would require much labor without increasing materially the sum total of judicial knowledge. Brady v. City of Chicago, 346 Ill. 532, cited by defendant, decides the liability of a city for causing the accumulation of artificial ice on its sidewalks. White v. City of Belleville, 384 Ill. App. 322, is a case where the facts were quite similar to those in this case and the decision quite favorable to defendant's view. The Appellate Court was, however, reversed by the Supreme Court in White v. City of Belleville, 384 Ill. 577. The cause was remanded to the Appellate Court with directions to pass on other errors. The Appellate Court then affirmed the judgment, 380 Ill. App. 316. "

We hold that White v. City of Belleville, 384 Ill. 577, and the

same case in 380 Ill. App. 316 are decisive here. The judgment for

plaintiff will be affirmed.

AFFIRMED.

O'Connor, J., concurs.

Mr. Justice McGraw participated in the decision of this case but passed away before the opinion was filed.

42579

319 L.A. 325

MATTIE GORTON,
Appellee,

v.

MARGOT LILLIAN NORRIS, ~~Executrix~~ of the
Estate of LA VERNE NORRIS, Deceased,
Appellant.

GEORGE L. HECKER,
Intervening Petitioner.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Mattie Gorton, then about 80 years of age, was severely injured on April 21, 1941, as she claimed, through the negligence of the Surface Lines. She was taken that day to the County Hospital, where she was until June 21, 1941; then to the Chicago Memorial Hospital, where she was until September 3, 1941, when she was taken to a home provided for her at 259 West 65th Street, Chicago. Numerous lawyers competed for the honor and privilege of representing Mrs. Gorton in her claim against the Surface Lines. May 20, 1941, at the Cook County Hospital, in the presence of Mr. Johnson, she signed a writing purporting to give to Attorney LaVerne Norris the right and power to prosecute her claim on a contingent fee of a sum equal to one-third of any amount recovered by suit and one-fourth of any amount recovered without suit. Attorney George L. Hecker saw her a little before this. On April 26 (four days after the accident) he says he went to see Mrs. Gorton at the request of her niece and, he says, made an agreement with Mrs. Gorton, orally, by which he was to represent her upon like contingent terms as to compensation. June 21, 1941, Mrs. Gorton signed a writing by which she employed Attorney Jerome M. Brooks upon a like contract for contingent compensation. In the employment of Brooks, Mrs. Gorton seems to have acted on the advice of her physician, Dr. Wilford.

313 A 328

MATTIE GORTON,

Appellee,

v.

MARGOT LILLIAN MORRIS, Executrix of the
Estate of LA VERNIE MORRIS, Deceased,
Appellant.

GEORGE L. HOOKER,

Intervening Petitioner.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE VERDICT OF THE COURT.

Mattie Gorton, then about 80 years of age, was severely injured on April 21, 1941, as she claimed, through the negligence of the Surface Lines. She was taken that day to the County Hospital, where she was until June 21, 1941; then to the Chicago Memorial Hospital, where she was until September 2, 1941, when she was taken to a home provided for her at 259 West 68th Street, Chicago. Numerous lawyers competed for the honor and privilege of representing Mrs. Gorton in her claim against the Surface Lines. May 20, 1941, at the Cook County Hospital, in the presence of Mr. Johnson, she signed a writing purporting to give to Attorney Lawrence Morris the right and power to prosecute her claim on a contingent fee of a sum equal to one-third of any amount recovered by suit and one-fourth of any amount recovered without suit. Attorney George L. Hooker saw her a little before this. On April 26 (four days after the accident) he says he went to see Mrs. Gorton at the request of her niece and, he says, made an agreement with Mrs. Gorton, orally, by which he was to represent her upon like contingent terms as to compensation. June 21, 1941, Mrs. Gorton signed a writing by which she employed Attorney Jerome M. Brooks upon a like contract for contingent compensation. In the employment of Brooks, Mrs. Gorton seems to have acted on the advice of her physician, Dr. Wilford.

Hecker (first employed) on the same day (April 26, 1941) gave notice to the Surface Lines of his employment and claim for lien. On June 20, 1941, (as he says, by direction of Mrs. Gorton) he filed a suit in her name against the Surface Lines in the Superior Court. Norris, by registered mail, notified the railway of his claim for lien on June 2. Brooks, employed June 21, gave notice two days later, on June 23, to the Surface Lines of his claim for lien, and on June 26, 1941, (by Mrs. Gorton's direction) he filed suit for her against the Surface Lines in the Superior Court. These suits were consolidated.

June 23, 1942, the claim of Mrs. Gorton against the Surface Lines was settled for \$3600. By written stipulation between Mrs. Gorton and the lien claimants, \$1,000 of this amount was turned over to her for then present necessities, and the balance deposited with the clerk of the court without prejudice to the rights of any of the claimants. Norris and Hecker then filed separate petitions to establish their respective liens. Mrs. Gorton filed an amended petition to have these claims for lien adjudicated, and it was ordered that the petitions of Norris and Hecker should stand as answers to her amended petition. The petition of Mrs. Gorton averred the employment of Brooks and the validity of his lien. He represented her in this proceeding to adjudicate the rights of the respective parties. The cause was tried by the court. Evidence was taken. The court found the Cook County Bureau of Public Welfare should be paid from the fund deposited, \$75; Hecker, for his attorney's fees, \$200; Brooks, for his attorney's fees, \$800; LaVerne Norris, for his attorney's fees, \$200; and the balance of \$1,325 should be paid to Mrs. Gorton. Judgment for each respective person entitled was entered. Other claimants acquiesced; Norris on October 30, 1942, appealed. Pending the appeal he died. His executrix now prosecutes his appeal and claims \$1200, one-third of the entire amount recovered.

The claim of the executrix is based on Paragraph 14, §1 of Chapter 13 of the Illinois Revised Statutes, creating a lien in favor of

Hecker (first employed) on the same day (April 28, 1941), gave notice to the Surface Lines of his employment and claim for lien. On June 20, 1941, (as he says, by direction of Mrs. Gordon) he filed a suit in her name against the Surface Lines in the Superior Court. Morris, by registered mail, notified the railway of his claim for lien on June 2. Brooke, employed June 21, gave notice two days later, on June 23, to the Surface Lines of his claim for lien, and on June 26, 1941, (by Mrs. Gordon's direction) he filed suit for her against the Surface Lines in the Superior Court. These suits were consolidated. June 22, 1942, the claim of Mrs. Gordon against the Surface Lines was settled for \$2800. By written stipulation between Mrs. Gordon and the lien claimants, \$1,000 of this amount was turned over to her for then present necessities, and the balance deposited with the clerk of the court without prejudice to the rights of any of the claimants. Morris and Hecker then filed separate petitions to establish their respective liens. Mrs. Gordon filed an amended petition to have these claims for lien adjudicated, and it was ordered that the petitions of Morris and Hecker should stand as answers to her amended petition. The petition of Mrs. Gordon averred the employment of Brooke and the validity of his lien. He represented her in this proceeding to adjudicate the rights of the respective parties. The cause was tried by the court. Evidence was taken. The court found the Cook County Bureau of Public Welfare should be paid from the fund deposited, \$75; Hecker, for his attorney's fees, \$200; Brooke, for his attorney's fees, \$200; Laverne Morris, for his attorney's fees, \$200; and the balance of \$1,325 should be paid to Mrs. Gordon. Judgment for each respective person entitled was entered. Other claimants acknowledged; Morris on October 30, 1942, appealed. Pending the appeal he died. His executrix now prosecutes his appeal and claims \$1200, one-third of the entire amount recovered. The claim of the executrix is based on Paragraph 14, 41 of Chapter 12 of the Illinois Revised Statutes, creating a lien in favor of

3.

attorneys. This section in substance declares that attorneys shall have a lien on claims, etc., placed in their hands by their clients for suit or collection, for the amount of any fee which may have been agreed upon, or in the absence of an agreement for a reasonable fee, "provided" the attorney shall serve notice in writing upon the parties against whom the claim is made, stating his interest etc., the lien to attach from the time of service of the notice and to be enforced in any court of competent jurisdiction on five days' notice by petition, etc.

The theory of the executrix is: "In accordance with the terms of the Power of Attorney, the intervening petitioner is entitled to one-third (1/3) of the amount recovered by the plaintiff, suit having been instituted before settlement of the claim". The trial judge did not state reasons for his decision. In so far as the judgment is based on issues of fact, the findings of the trial court are entitled to the same weight in this court as the verdict of a jury. People ex rel Drainage Commissioners v. C. & E. I. Ry. Co., 258 Ill. App. 535. The executrix takes the position (citing cases) that the power of attorney signed by Mrs. Gorton is controlling, and that, as a matter of law, the court had no right to award fees on any basis other than that provided in the writing. Barnes v. Barnes, 225 Ill. App. 68; Caruso v. Pelling, 271 Ill. App. 318; Goldberg v. Perlmutter, 308 Ill. App. 84. She contends that the client could not deprive the attorney of his lien by discharging him. Tulka v. Chicago City Ry. Co., 259 Ill. App. 234. These cases so hold under circumstances appearing in each. It also appears from the same cases that the lien of an attorney is not barred merely by the fact that he is not attorney of record in a suit brought on the claim against which he has a lien, and the compromise and settlement of such a claim by the client, without consent of the attorney, does not impair the attorney's right under the statute. Morris v. Eckstrom, 291 Ill. App. 614.

However, this case is in many respects unlike any of the cases cited. Here, there were issues of fact, and the executrix does not

attorneys. This section in substance declares that attorneys shall have a lien on claims, etc., placed in their hands by their clients for suit or collection, for the amount of any fee which may have been agreed upon, or in the absence of an agreement for a reasonable fee, "provided" the attorney shall serve notice in writing upon the parties against whom the claim is made, stating his interest etc., the lien to attach from the time of service of the notice and to be enforced in any court of competent jurisdiction on five days' notice by petition, etc. The theory of the executrix is: "In accordance with the terms

of the power of Attorney, the intervening petitioner is entitled to one-third (1/3) of the amount recovered by the plaintiff, suit having been instituted before settlement of the claim." The trial judge did not state reasons for his decision. In so far as the judgment is based on issues of fact, the findings of the trial court are entitled to the same weight in this court as the verdict of a jury. People ex rel Dwyane Commissioners v. G. & E. I. Ry. Co., 258 Ill. App. 536. The executrix takes the position (citing cases) that the power of attorney signed by Mrs. Gordon is controlling, and that, as a matter of law, the court had no right to award fees on any basis other than that provided in the

writing. Barnes v. Barnes, 225 Ill. App. 68; Garnes v. Bellino, 271 Ill. App. 318; Goldberg v. Perlmutter, 308 Ill. App. 84. She contends that the client could not deprive the attorney of his lien by discharging him. Tulka v. Chicago City Ry. Co., 259 Ill. App. 334. These cases so hold under circumstances appearing in each. It also appears from the same cases that the lien of an attorney is not barred merely by the fact that

he is not attorney of record in a suit brought on the claim against which he has a lien, and the compromise and settlement of such a claim by the client, without consent of the attorney, does not impair the attorney's right under the statute. Morris v. Eckstrom, 201 Ill. App. 614.

However, this case is in many respects unlike any of the cases cited. Here, there were issues of fact, and the executrix does not

4.

contend the judgment entered is against the manifest weight of the evidence. It is apparent from the judgment in favor of Hecker the court found as a fact he had been employed by Mrs. Gorton, although she denied this. However, if he was employed then the uncontradicted evidence showed that his employment and the notice given of it under the statute was first in order of time, and his claim would appear to have precedence. We can only guess the theory of the court. Mrs. Gorton's testimony is to the effect that the employment of Norris was for only the limited purpose of investigation etc. The fact that, unlike the other attorneys, he did not bring ^{any} suit, tends to give color to her testimony. The executrix in her reply brief argues for the first time that the evidence tending to show the limited nature of his employment was inadmissible as tending to vary the terms of a written contract. The record fails to show objection in the trial court on that ground. The evidence of Mrs. Gorton tends to show she did not know the nature or contents of the paper she signed, and that her physical condition was such she could not have appreciated its importance. The whole evidence indicates this was true. She needed only one lawyer; she hired three. It is quite apparent she was overpersuaded and quite incompetent to handle this business.

Moreover, it is not proved the notice of lien given by Norris was accurate in its description of the time when and the place where the accident in question occurred. As to all liens claimed, proof of identity of the claim is subject to criticism. The statute says that the lien shall attach as of the date of the giving of notice. The notice should state the claim accurately.

We do not care to rest our decision on any merely technical ground. The executrix is the only party complaining. She asks judgment for one-third of the entire amount obtained in settlement. If each lien claimant was made a like allowance, there would be nothing at all left for Mrs. Gorton. The lawyers would take it all. Although she does not say so, we think it apparent the executrix wishes to be ^{this} given/\$1200 to the exclusion of other claimants who the court found

content the judgment entered is against the manifest weight of the evidence. It is apparent from the judgment in favor of Becker the court found as a fact he had been employed by Mrs. Gordon, although she denied this. However, if he was employed then the uncontradicted evidence showed that his employment and the notice given of it under the statute was first in order of time, and his claim would appear to have precedence. We can only guess the theory of the court. Mrs. Gordon's testimony is to the effect that the employment of Morris was for only the limited purpose of investigation etc. The fact that, unlike the other attorneys, he did not bring ^{any} suit, tends to give color to her testimony. The executrix in her reply brief argues for the first time that the evidence tending to show the limited nature of his employment was inadmissible as tending to vary the terms of a written contract. The record fails to show objection in the trial court on that ground. The evidence of Mrs. Gordon tends to show she did not know the nature or contents of the paper she signed, and that her physical condition was such she could not have appreciated its importance. The whole evidence indicates this was true. She needed only one lawyer; she hired three. It is quite apparent she was over persuaded and quite incompetent to handle this business. Moreover, it is not proved the notice of lien given by Morris was accurate in its description of the time when and the place where the accident in question occurred. As to all liens claimed, proof of identity of the claim is subject to criticism. The statute says that the lien shall attach as of the date of the giving of notice. The notice should state the claim accurately. We do not care to rest our decision on any merely technical ground. The executrix is the only party complaining. She asks judgment for one-third of the entire amount obtained in settlement. If each lien claimant was made a like allowance, there would be nothing at all left for Mrs. Gordon. The lawyers would take it all. Although she does not say so, we think it apparent the executrix wishes to be given \$1200 to the exclusion of other claimants who the court found ^{this}

5.

were entitled to participate. The statute contravenes the common law. It is to be strictly construed. Berkemeier v. Dormurat Motor Sales, 263 Ill. App. 211, 218. The proceeding is purely statutory. It is, strictly speaking, neither at law nor in equity. We doubt whether a written agreement made under the circumstances appearing here should be permitted to be made the basis of claim for an attorney's lien. This old lady was badly injured. Her hip was broken. This contract was made while she was confined to the hospital and in much pain. She says she didn't know what it was or what was in it. Manifestly, she did not.

If we were to hold the executrix entitled to one-third of the whole amount recovered to the exclusion of other lawyers, the result would be unjust. We hold the trial court attained substantial justice. The executrix shows no good reason to reverse. No other complains. The judgment will be affirmed.

JUDGMENT AFFIRMED.

O'Connor, J., concurs.

313 1.1. 326

JOHN GHISOLF,

Appellee,

v.

HOTEL AND APARTMENT HOTEL SERVICE
WORKERS AND MISCELLANEOUS RESTAURANT
EMPLOYEES UNION NO. 593,
Appellant.

APPEAL FROM

MUNICIPAL COURT,
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, husband and next of kin of Rose Ghisolf, deceased, sued to recover a death benefit of \$150 said to be due to him from the defendant union by reason of her death. He filed his statement of claim October 6, 1942. Defendant was served and appeared but did not file an affidavit of merits and none was required by rule 14 of the court. There was trial by the court without a jury and a finding for plaintiff for \$150 with judgment, and defendant appeals. There has been no appearance by plaintiff in this court.

It is argued the contract for the payment of the death benefit was with the International Union as distinguished from the Local Union (defendant), which is affiliated with it. The offices of the International Union, which is also affiliated with the American Federation of Labor, are in Cincinnati, Ohio. The Constitution and By-laws are in evidence. The provision for death burial benefit is found in Section 141. It says:

"The International Union shall pay upon the death of a member who has been in continuous good standing for a period of twelve calendar months immediately preceding his or her death, the sum of one hundred and twenty-five dollars (\$125.00); and to a member who has been in continuous good standing for twenty-four calendar months immediately preceding his or her death the sum of one hundred and fifty dollars (\$150.00), said sum to be paid to the Local Union that the deceased was a member of, and said Local Union in turn, shall pay the aforesaid amounts to such persons as the deceased may have designated during his or her lifetime. The aforesaid

31-1-36

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

JOHN GHISOLFI,
Appellee,

v.

HOTEL AND APARTMENT HOUSE SERVICE
WORKERS AND MISCELLANEOUS RESTAURANT
EMPLOYEES UNION NO. 523,
Appellant.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Plaintiff, husband and next of kin of Rose Ghisolfi, deceased, sued to recover a death benefit of \$150 said to be due to him from the defendant union by reason of her death. He filed his statement of claim October 8, 1942. Defendant was served and appeared but did not file an affidavit of merits and none was required by rule 14 of the court. There was trial by the court without a jury and a finding for plaintiff for \$150 with judgment, and defendant appeals. There has been no appearance by plaintiff in this court.

It is argued the contract for the payment of the death benefit was with the International Union as distinguished from the Local Union (defendant), which is affiliated with it. The offices of the International Union, which is also affiliated with the American Federation of Labor, are in Cincinnati, Ohio. The Constitution and By-laws are in evidence. The provision for death burial benefit is found in Section

141. It says:

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amounts shall be defrayed for burial expenses. Provided, however, that no member of the International Union shall be designated as such beneficiary, unless he or she be a relative of the deceased, and that no payment shall be made until proof of death has been submitted under seal of the Local to which the deceased belonged. And further provided, that no claim shall be allowed unless all provisions of the Death Burial Benefit laws have been complied with.

"(a) Nothing in this provision shall be construed, or intended to be construed as an obligation on the part of the International to any undertaker who conducts funeral arrangements for any deceased member."

We hold that under this provision the contract was by the Local Union to pay plaintiff. On the trial plaintiff proved he was the husband and next of kin of Rose Ghisolf, that she died September 30, 1942; that she was a member in good standing of the defendant union for two years prior to her death, and that she had paid all dues and assessments levied. A photostatic copy of the books and records of the union and correspondence with the deceased are in evidence. It is ^{show} true these/that during the period from May to August, 1942, deceased stood suspended from the union for non-payment of dues. However, the evidence also shows that on August 20, 1942, she was reinstated, and that at that time she paid the sum of \$20.00 in full of all dues and assessments. Defendant argues that because of her suspension she had not been "in continuous good standing" for the period of time required by the Constitution and By-laws for the payment of death benefits. This would be a very technical construction of this section. Defendant having accepted payment of all dues and assessments due from the deceased on August 20, 1942, is now estopped to claim deceased was not a member in good standing during the entire period of time for which she paid dues. This court has recently passed on a like question. See Mims v. Mutual Benefit & Accident Ass'n., No. 42440, opinion filed May 10, 1943.

The judgment is affirmed.

AFFIRMED.

O'Connor, J., concurs.

APPROVED.

The judgment is affirmed.

May 10, 1945.

Mims v. Mutual Benefit & Accident Ass'n., No. 42440, opinion filed

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for two years prior to her death, and that she had paid all dues and

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husband and next of kin of Rose Ghisolfi, that she died September 30,

Union to pay plaintiff. On the trial plaintiff proved he was the

We hold that under this provision the contract was by the Local

"(a) Nothing in this provision shall be construed, or intended to be construed as an obligation on the part of the International to any undertaker who conducts funeral arrangements for any deceased member."

laws have been complied with, allowed unless all provisions of the Death Benefit Benefit delonged. And further provided, that no claim shall be submitted under seal of the Local to which the deceased payment shall be made until proof of death has been he or she be a relative of the deceased, and that no Union shall be designated as such beneficiary, unless provided, however, that no member of the International amounts shall be delivered for burial expenses.

GENEVIEVE M. RACINE, Executrix of
the Estate of George P. Racine,
Deceased, and ELSIE SLOAN,
Appellees,

v.

LEBIA BLACKBORN, GEORGE C. ADAMS,
MINERVA J. ADAMS, et al.

APPEAL OF GEORGE C. ADAMS, MINERVA J.
ADAMS and LEBIA BLACKBORN,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

319 I.A. 5262

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

May 8, 1940, Genevieve M. Racine, executrix of the estate of George P. Racine, deceased, filed her bill to foreclose the lien of a junior mortgage dated May 20, 1929, on premises known as 4439-41 South Michigan avenue, made by defendant Lebia Blackborn to secure an indebtedness of \$10,000 evidenced by her 36 notes conveying the premises to the Chicago Title & Trust Company, trustee. In the complaint it was alleged that the executrix was the owner and holder of 26 of the notes each for \$150, the first due one month after date and that one note became due each month thereafter; that no payment of principal or interest had been made. Afterward Elsie Sloan filed her answer and counterclaim in which she alleged she was the owner of 10 of the notes, 9 for \$150 each and the 10th one for \$4,750; that the first of these 10 notes was due 27 months after date and the 9 other notes came due one each month thereafter. The counterclaimant alleged nothing had been paid of either interest or principal on any of the notes. Defendants answered and numerous pleadings were filed. The case was tried before the chancellor, there was a finding and decree for the amount claimed by plaintiff and counterclaimant and defendants George C. Adams, Minerva J. Adams and Lebia Blackborn appeal.

The record is very complicated and much confused but since we have

CIRCUIT COURT.

COCK COUNTY

MINERVA J. ADAMS, of St. LEBIA BLACKBORN, GEORGE C. ADAMS,

ADAMS and LEBIA BLACKBORN,
Appellants,
APPEAL OF GEORGE C. ADAMS, MINNEAPOLIS.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

The record is very complicated and much confused but since we have Adams and Ledia Blackburn appeal.

Plaintiff and counterclaimant and defendant George G. Adams, Minerva J. the chancellor, there was a finding and decree for the amount claimed by answered and numerous pleadings were filed. The case was tried before been paid of either interest or principal on any of the notes. Defendants one each month thereafter. The counterclaimant alleged nothing had 10 notes was due 27 months after date and the 9 other notes came due 9 for \$150 each and the 10th one for \$4,750; that the first of these counterclaim in which she alleged she was the owner of 10 of the notes, interest had been made. Afterward Elsie Sloan filed her answer and became due each month thereafter; that no payment of principal or each for \$150, the first due one month after date and that one note alleged that the executrix was the owner and holder of 26 of the notes to the Chicago Title & Trust Company, trustee. In the complaint it was indebtedness of \$10,000 evidenced by her 26 notes conveying the premises South Michigan Avenue, made by defendant Ledia Blackburn to secure an a Junior mortgage dated May 20, 1928, on premises known as 4432-41 George P. Rasine, deceased, filed her bill to foreclose the lien of May 8, 1940, Genevieve M. Rasine, executrix of the estate of

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reached the conclusion that there must be another trial, we do not discuss the evidence in detail but think it sufficient to say that the evidence tends to show that in May, 1929, defendant, George C. Adams was negotiating to purchase the premises in question which was encumbered; that it was finally agreed by the owner of the equity and Adams that the owner would sell the equity for \$3,000. With that end in view Adams borrowed \$2500 from George P. Racine and with this sum together with \$500 of his own funds, he bought the equity taking title in defendant Lebia Blackburn who was a stenographer in Adams's office, and on the 20th of May, 1929, Lebia Blackburn executed the notes and trust deed in question and they were delivered to Racine.

Defendant George C. Adams who was an attorney, in his opening statement said: "George P. Racine agreed to sell a mortgage for \$10,000 and agreed to advance the sum of \$2,500 to acquire title to the property at 4439-41 Michigan Avenue and the remaining portion of \$7,500 was to be paid to George C. Adams after the taxes and repair bills had been paid. Mr. Racine represented to Adams that he could sell the \$10,000 mortgage. The mortgage was delivered to Mr. Racine on the 20th day of May, 1929, after the same had been acknowledged by him as Notary Public; that thereafter, demands were made repeatedly upon Mr. Racine for the remaining \$7,500, less his commission of 10 per cent, by George C. Adams and Minerva J. Adams in the presence of witnesses, Racine repeatedly promised to pay out the \$7,500 but failed to do so." The evidence further tends to show that on a number of occasions when the matter was taken up with Racine he stated that the notes and trust deed had been lost or stolen.

The evidence is also to the effect that counterclaimant Sloan was a stenographer employed by Racine at the time of the making of the notes and trust deed by defendant Blackburn. She testified that she bought the 10 notes from Racine November 26, 1929, and paid \$6,100 for them by returning \$4,000 and some odd dollars in Bender notes which she held and paid the balance by check drawn on the Pullman Trust & Savings Bank. That she had never made any demand

reached the conclusion that there must be some other person who had reached the evidence in detail but that it is difficult to say to the evidence tends to show that in May, 1929, defendant Adams was negotiating to purchase the property in question which was encountered; that it was finally agreed by the owner of the property and Adams that the owner would sell the property for \$3,000. With this end in view Adams borrowed \$2500 from George F. Racine and with this sum together with \$500 of his own funds, he bought the property, taking title in defendant Leola Blackborn who was a stenographer in Adams' office, and on the 20th of May, 1929, Leola Blackborn executed the notes and trust deed in question and they were delivered to Adams.

Defendant George F. Adams who was at that time in his opening statement said: "George F. Racine agreed to sell a mortgage for \$10,000 and agreed to advance the sum of \$2,500 to acquire title to the property at 4438-41 Michigan Avenue and the remaining portion of \$7,500 was to be paid to George F. Adams after the taxes and utility bills had been paid. Mr. Racine represented to Adams that he could sell the \$10,000 mortgage. The mortgage was delivered to George F. Racine on the 20th day of May, 1929, after the same had been acknowledged by him as Notary Public; that thereafter, Adams and Racine orally agreed upon Mr. Racine for the remaining \$7,500, less his commission of 10 per cent, by George F. Adams and himself to come in the amount of witness, Racine repeatedly promised to pay out the \$7,500 but failed to do so." The evidence further tends to show that on a number of occasions when the matter was taken up with Racine he stated that the notes and trust deed had been lost or stolen.

The evidence is also to the effect that defendant Adams was a stenographer employed by Racine at the time of the making of the notes and trust deed by defendant Blackborn. The testified that she bought the 10 notes from Racine November 22, 1929, and paid \$6,100 for them by returning \$4,000 and some odd dollars in other notes which she held and paid the balance by check drawn on the Pullman Trust & Savings Bank. That she had never seen any bond

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for the payment of principal or interest on any of the notes.

William R. Avaré, called by defendants testified he was auditor for the Pullman Trust & Savings Bank; that in November, 1929, there was a joint account of Robert A. Sloan and Elsie Sloan which had been opened September 29, 1915. He then testified from the records of the bank which show that no check of the amount required to pay for the balance of the face of the 10 notes was drawn on the account or paid by the bank.

The evidence further shows that September 22, 1937, Genevieve M. Racine, plaintiff, was appointed executrix of the estate of George P. Racine, deceased, and that some time after the appointment, the 26 notes claimed by her, as above stated, were found among the papers of George P. Racine, the deceased. There is other evidence in the record to the effect that defendant, George C. Adams, acted as attorney for George P. Racine in a number of matters for which he claimed there was due and owing to him nearly \$9,000 and that it was agreed between Racine and Adams that the \$2,500 which Racine had loaned to Adams when Adams was purchasing the property, as above stated, would be applied toward the payment of the fees.

Defendant contends that the action was barred by Ill. Rev. Stat. 1941, chap. 83, §11, which provides that the action to foreclose the lien of a trust deed is barred in 10 years after the right of action accrues, and it is argued that since there was a default in payment on June 20, 1929, when the first note was due, the statute began to run on that date but the suit was not commenced until May 8, 1940, more than 10 years after the first default. We think there is no merit in this contention. The payment of the notes was not accelerated and the suit was brought long before the last notes became due.

Defendants further contend that they did not receive a fair and impartial trial and that the court erred in ruling on the admission and exclusion of evidence. We think this contention must be sustained and without specifying anything that occurred in this

for the payment of principal or interest on any of the notes.
 William E. Avery, called by defendants testified he was auditor
 for the Pulman Trust & Savings Bank; that in November, 1913, there
 was a joint account of Robert A. Loan and Alice Olson which had been
 opened September 23, 1913. He then testified from the records of the
 bank which show that no check of the amount required to pay for the
 balance of the face of the 10 notes was drawn on the account or paid
 by the bank.

The evidence further shows that September 23, 1907, Genevieve
 M. Racine, plaintiff, was associated executrix of the estate of George
 P. Racine, deceased, and that some time after the death of the
 28 notes claimed by her, as above stated, were found among the papers
 of George P. Racine, the deceased. There is other evidence in the
 record to the effect that defendant, George P. Racine, acted as
 attorney for George P. Racine in a number of matters for which he
 claimed there was due and owing to him nearly \$3,000 and that it was
 agreed between Racine and Adams that the \$3,000 which Racine had
 loaned to Adams when Adams was purchasing the property, as above
 stated, would be applied toward the payment of the fees.

Defendant contends that the action was barred by Ill. Rev. Stat.
 1901, chap. 53, §11, which provides that the action to foreclose the
 lien of a trust deed is barred in 10 years after the right of action
 accrues, and it is argued that since there was a default in payment
 on June 30, 1909, when the first note was due, the statute began to
 run on that date but the suit was not commenced until May 3, 1920,
 more than 10 years after the first default. It is claimed that there is no
 merit in this contention. The payment of the notes was not accelerated
 and the suit was brought before the last notes became due.
 Defendants further contend that they did not owe five cents

and impartial trial and that the court erred in ruling on the
 admission and exclusion of evidence. We think this contention must
 be sustained and without specifying anything that occurred in this

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connection, we think it clearly appears that defendants did not have a fair trial and for that reason, the decree of the Circuit court is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., concurs.

Mr. Justice McSurely participated in the decision of this case but passed away before the opinion was filed.

connection, we think it clearly appears that defendant did not have a fair trial and for that reason, the decree of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

MASTERS, P. J., concurs.

Mr. Justice McSwain participated in the decision of this case but passed away before the opinion was filed.

JOHN KARATKIEWICZ and
JOANNA KARATKIEWICZ,
Appellants,

v.

STANISLAWA STRZYZYNSKI,
Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

319 I.A. 527

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

December 7, 1937, plaintiffs filed a complaint in chancery against defendant. A motion to strike was sustained, subsequently plaintiffs filed two amended complaints and July 17, 1939, filed their complaint at law to recover \$3,270 claimed to be due them for the balance of a loan of \$2,500 made March 8, 1927, and interest thereon. After the issue was made up the cause was tried before the court without a jury. There was a finding and judgment in defendant's favor and plaintiffs appeal.

The substance of the allegations of the complaint is that plaintiffs and defendant were related through marriage and March 8, 1927, plaintiffs loaned \$2,500 to defendant. As security for the loan, defendant turned over to plaintiffs a second mortgage on a certain piece of real estate in Chicago, securing an indebtedness of \$6,228. The agreement between the parties was in writing and is set up verbatim in the complaint. It is signed by plaintiffs and defendant, dated March 8, 1927, and recites the loan of \$2,500, the giving of the second mortgage for \$6,228; that the loan is to be repaid in 2 1/2 years and upon such payment being made, the real estate mortgage will be returned by plaintiffs to defendant.

It is further alleged that about November, 1929, defendant came to plaintiffs' home and told them the indebtedness secured by the real estate mortgage would be due in December, 1929; that it was necessary that plaintiffs turn over the mortgage to defendant for collection and

JOHN KARATKIEWICZ and
JOANNA KARATKIEWICZ,
Appellants,

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

STANISLAW STRZYZYNSKI,
Appellee.

3191A-227

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.
December 7, 1937, plaintiffs filed a complaint in chancery against defendant. A motion to strike was sustained, subsequently plaintiffs filed two amended complaints and July 17, 1938, filed their complaint at law to recover \$2,270 claimed to be due them for the balance of a loan of \$2,500 made March 8, 1937, and interest thereon. After the issue was made up the cause was tried before the court without a jury. There was a finding and judgment in defendant's favor and plaintiffs appeal.

The substance of the allegations of the complaint is that plaintiffs and defendant were related through marriage and March 8, 1937, plaintiffs loaned \$2,500 to defendant. As security for the loan, defendant turned over to plaintiffs a second mortgage on a certain piece of real estate in Chicago, securing an indebtedness of \$6,228. The agreement between the parties was in writing and is set up verbatim in the complaint. It is signed by plaintiffs and defendant, dated March 8, 1937, and recites the loan of \$2,500, the giving of the second mortgage for \$6,228; that the loan is to be repaid in 2 1/2 years and upon such payment being made, the real estate mortgage will be returned by plaintiffs to defendant.

It is further alleged that about November, 1938, defendant came to plaintiffs' home and told them the indebtedness secured by the real estate mortgage would be due in December, 1939; that it was necessary that plaintiffs turn over the mortgage to defendant for collection and

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that when she, the defendant, collected the money on the mortgage, she would pay plaintiffs the \$2,500; that relying upon this promise, plaintiffs turned over the mortgage to defendant who collected the money and converted the proceeds to her own use; that defendant made the following payments on the loan: September 15, 1927, \$75; March 4, 1930, \$150; August 9, 1932, \$75; that no other payments were made and that the balance was due with 5% interest, making a total of \$3,270.

To the complaint defendant filed a motion to strike. The motion was sustained "only as to the matters of tort" and overruled as to the balance. March 13, 1941, defendant filed an amended complaint apparently eliminating the allegations of tort and April 11, 1941, filed her answer in which she admitted the parties were related through marriage; denied that plaintiffs had loaned her \$2,500 or any other sum or that she had deposited with plaintiffs the real estate mortgage as collateral. She admitted executing the instrument dated March 8, 1927, which was the basis of the suit but denied that she undertook to repay the loan of \$2,500 in 2 1/2 years from that date. She specifically denied that she had deposited with plaintiffs the real estate mortgage and also pleaded the Statute of Limitations.

May 28, 1941, by leave of court, defendant filed an amendment to her answer adding allegations in which she set up that the indebtedness of \$2,500 had been paid and satisfied by Joseph Janicke, that he had delivered to plaintiffs alcohol of the value of \$3,000. That plaintiffs were operating a tavern from April 1, 1927 to November 1, 1929 and had accepted the alcohol in full satisfaction and payment of the \$2,500 loan. The amendment further set up that defendant had received no part of the \$2,500 but that plaintiffs had loaned the \$2,500 to Joseph Janicke; that loan was afterward paid by Joseph Janicke and the second mortgage (securing an indebtedness of \$6,228 which was pledged as collateral security) was delivered by plaintiffs to Joseph Janicke who returned it. That the \$2,500 was paid by Janicke in November, 1929.

The court heard the evidence and found the \$2,500 loan had been

The court heard the evidence and found the \$2,500 loan had been repaid. That the \$2,500 was paid by Janice in November, 1939, as collateral security) was delivered by plaintiff to Joseph Janice second mortgage (securing an indebtedness of \$6,228 which was pledged Joseph Janice; that loan was afterward paid by Joseph Janice and the part of the \$2,500 but that plaintiff had loaned the \$2,500 to loan. The amendment further set up that defendant had received no accepted the alcohol in full satisfaction and payment of the \$2,500 were operating a tavern from April 1, 1937 to November 1, 1939 and had delivered to plaintiff alcohol of the value of \$2,000. That plaintiff of \$2,500 had been paid and satisfied by Joseph Janice, that she had her answer adding allegations in which she set up that the indebtedness May 28, 1941, by leave of court, defendant filed an amendment to estate mortgage and also pleaded the statute of limitations. specifically denied that she had deposited with plaintiff the real to repay the loan of \$2,500 in 2 1/2 years from that date. She 1937, which was the basis of the suit but denied that she undertook as collateral. She admitted executing the instrument dated March 8, sum or that she had deposited with plaintiff the real estate mortgage marriage; denied that plaintiff had loaned her \$2,500 or any other her answer in which she admitted the parties were related through apparently eliminating the allegations of tort and April 11, 1941, filed balance. March 13, 1941, defendant filed an amended complaint was sustained "only as to the matter of tort" and overruled as to the To the complaint defendant filed a motion to strike. The motion the balance was due with 5% interest, making a total of \$2,270. \$150; August 2, 1938, \$75; that no other payments were made and that following payments on the loan: September 15, 1937, \$75; March 4, 1930, money and converted the proceeds to her own use; that defendant made the plaintiff turned over the mortgage to defendant who collected the she would pay plaintiff the \$2,500; that relying upon this promise, that when she, the defendant, collected the money on the mortgage,

3.

paid, partly in cash by Joseph Janicke and the balance by Janicke delivering alcohol to plaintiffs.

In deciding the case the court said: "I don't know how much was paid in cash and how much in merchandise, but am satisfied it was paid."

The only contention made by counsel for plaintiffs is that the finding is against the manifest weight of the evidence. Joseph Janicke was a nephew of plaintiffs and was married to defendant's daughter. The theory of plaintiffs was that they loaned the \$2,500 to defendant who wanted the money to repair a building which she had recently purchased and that the money or part of it, was used for this purpose, or, that the money was borrowed by defendant for the benefit and use of her son-in-law, Joseph Janicke, and that on either theory defendant was liable on the written instrument, signed by her and plaintiffs March 8, 1927. On the other side, defendant's theory was that the \$2,500 was loaned, as evidenced by the written document, for the benefit of defendant's son-in-law, Joseph Janicke; that he got the money and repaid it, \$500 or \$600 in cash and the balance by delivering alcohol to plaintiffs in full satisfaction of the loan. Evidence was introduced tending to substantiate the respective theories of the parties.

We have carefully considered all the evidence in the record, have had the benefit of an informal oral argument by counsel for the respective parties and have reached the conclusion that the finding and judgment is against the manifest weight of the evidence. But since we are of opinion that there should be another trial, we refrain from discussing the evidence in detail, except to say that plaintiffs explain the delay in bringing suit on the ground that they were reluctant to do so because the matter involved a family affair. They also contend that the court was in error in finding that the indebtedness had been paid and that this is shown by the letter written April 13, 1937, from Grand Rapids, Michigan, by Joseph Janicke or by his wife, as she testified, which we think shows that most, if not all, of the \$2,500 was then due and unpaid. We are not impressed

paid, partly in cash by Joseph Janicko and the balance by Janicko

delivering alcohol to plaintiffs.

In deciding the case the court said: "I don't know how much was

paid in cash and how much in merchandise, but am satisfied it was paid."

The only contention made by counsel for plaintiffs is that the

finding is against the manifest weight of the evidence. Joseph Janicko

was a nephew of plaintiffs and was married to defendant's daughter.

The theory of plaintiffs was that they loaned the \$2,500 to defendant

who wanted the money to repair a building which she had recently

purchased and that the money or part of it, was used for this purpose,

or, that the money was borrowed by defendant for the benefit and use

of her son-in-law, Joseph Janicko, and that on either theory defendant

was liable on the written instrument, signed by her and plaintiffs

March 6, 1937. On the other side, defendant's theory was that the

\$2,500 was loaned, as evidenced by the written document, for the

benefit of defendant's son-in-law, Joseph Janicko; that he got the

money and repaid it, \$500 or \$600 in cash and the balance by delivering

alcohol to plaintiffs in full satisfaction of the loan. Evidence was

introduced tending to substantiate the respective theories of the

parties.

We have carefully considered all the evidence in the record, have

had the benefit of an informal oral argument by counsel for the

respective parties and have reached the conclusion that the finding

and judgment is against the manifest weight of the evidence. But

since we are of opinion that there should be another trial, we refrain

from discussing the evidence in detail, except to say that plaintiffs

explain the delay in bringing suit on the ground that they were

reluctant to do so because the matter involved a family affair. They

also contend that the court was in error in finding that the indebted-

ness had been paid and that this is shown by the letter written

April 13, 1937, from Grand Rapids, Michigan, by Joseph Janicko or

by his wife, as she testified, which we think shows that most, if

not all, of the \$2,500 was then due and unpaid. We are not impressed

4.

with the contention of defendant that this letter was in answer to one written to him by plaintiff, Joanna, which shows that Joanna was trying to borrow money from Janicke. An examination of the record fails to disclose that the court, in deciding the case, considered this letter.

We think upon a retrial of the case additional evidence might be adduced which may enable the court to pass upon the merits of the case.

The judgment of the Superior court of Cook county is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Matchett, P. J., concurs.

4.
with the contention of defendant that this letter was in answer
to one written to him by plaintiff, Jones, which shows that Jones
was trying to borrow money from Leacock. An examination of the
record fails to disclose that the court, in deciding the case,
considered this letter.

We think upon a retrial of the case additional evidence might
be adduced which may enable the court to pass upon the merits of the
case.

The judgment of the Superior court of Cook county is reversed
and the cause remanded for a new trial.

REVEREND AND HONORABLE.

Matchett, P. J., concurs.

42728

JOHN J. KELLY,

Appellee,

v.

PAUL B. BRICE and the DURABLE
MATERIALS PATENT CORPORATION,
a corporation,

Appeal of
PAUL B. BRICE,

Appellant.

102
418
INTERLOCUTORY APPEAL
FROM CIRCUIT COURT,
COOK COUNTY.

319 I.A. 527²

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal defendant Brice seeks to reverse an order entered April 13, 1943, enjoining him from disposing of 25 shares of stock standing in his name issued by defendant corporation, etc.

April 7, 1943, plaintiff filed his verified complaint in chancery praying that defendant, Paul B. Brice, be decreed to specifically perform an agreement entered into between him and plaintiff - that Brice be decreed to endorse a stock certificate for 25 shares issued to him by defendant corporation in which plaintiff had an interest of 25%; that Brice be enjoined from disposing of or voting the 25 shares of stock and that defendant corporation be enjoined from paying Brice any dividends that might be declared on the stock. Attached to and made a part of the complaint was a document dated November 15, 1939, signed by Brice, assigning and selling to plaintiff 25% interest in the 25 shares of stock and a further document, made a part of the complaint, dated April 1, 1943, which purports to be a written notice given by plaintiff to Brice demanding that Brice endorse the certificate for 25 shares of stock so that a certificate for 6 1/4 shares might be issued by the corporation to plaintiff and 18 3/4 shares to Brice upon the surrender and cancellation of the original certificate for 25 shares. The notice stated that unless

JOHN J. KELLY,

Appellee,

v.

PAUL E. BRICE and the DENRALL
MATERIALS PATENT CORPORATION,
a corporation,Appellant,
PAUL E. BRICE,

Appellant.

IN REPLY TO ORDER

FROM CIRCUIT COURT

OF THE DISTRICT OF COLUMBIA

MR. PRESIDING JUSTICE OF COMMONS DELIVERED THE VERDICT OF THE COURT.

By this appeal defendant Brice seeks to reverse an order entered April 15, 1943, enjoining him from disposing of 25 shares of stock standing in his name issued by defendant corporation, etc.

April 7, 1943, plaintiff filed his verified complaint in chancery praying that defendant, Paul E. Brice, be decreed to specifically perform an agreement entered into between him and plaintiff - that Brice be decreed to endorse a stock certificate for 25 shares issued to him by defendant corporation in which plaintiff has an interest of 25%; that Brice be enjoined from disposing of or voting the 25 shares of stock and that defendant corporation be enjoined from paying Brice any dividends that might be declared on the stock.

Attached to and made a part of the complaint was a document dated November 15, 1939, signed by Brice, assigning and selling to plaintiff 25% interest in the 25 shares of stock and a further document, made a part of the complaint, dated April 1, 1943, which purports to be a written notice given by plaintiff to Brice demanding that Brice endorse the certificate for 25 shares of stock so that a certificate for 6 1/4 shares might be issued by the corporation to plaintiff and 18 3/4 shares to Brice upon the surrender and cancellation of the original certificate for 25 shares. The notice stated that unless

2.

Brice complied with the demand suit would be brought. Upon the filing of the suit summons was issued and served by the sheriff on the two defendants the same day.

April 9, plaintiff served notice on the two defendants that on April 13 he would present a petition, copy of which was attached to the notice, and move that an order be entered in accordance with the prayer of the petition. April 13, plaintiff filed his verified petition in which he set up the filing of the suit, the issuance of the summons and alleged that he was informed and believed and upon such information and belief charged the fact to be that a stockholders' meeting and a meeting of the Board of Directors of defendant corporation would be held in the very near future for the purpose of electing directors and declaring a dividend on the outstanding stock. The prayer was that Brice be enjoined from disposing of or assigning the 25 shares of stock; from voting the stock; and that defendant corporation be enjoined from paying Brice any dividend on the 25 shares that might be declared by the Board of Directors.

April 13, the court entered the order which is appealed from in which it is recited that the motion of plaintiff came on for hearing, the court read and considered the complaint, the verified petition and the prayer for an injunction and the court having heard arguments of counsel, it was ordered that a writ of injunction issue restraining Brice from selling or transferring any part of the 25 shares of stock and that he be enjoined from voting 6 1/4 shares of the stock. The order further enjoined defendant corporation from paying Brice any dividends on the 25 shares that might be declared by the directors. The injunction was to be in effect until the further order of court.

April 16, 1943, the court on motion of the solicitor of defendant Brice, entered an order fixing Brice's appeal bond to secure the costs of appeal at \$250. Three days later the bond was approved by the court.

Brice complied with the demand suit would be brought. Upon the filing of the suit summons were issued and served by the sheriff on the two defendants the same day.

April 9, Plaintiff served notice on the two defendants that on April 13 he would present a petition, copy of which was attached to the notice, and move that an order be entered in accordance with the prayer of the petition. April 13, Plaintiff filed his verified petition in which he set up the filing of the suit, the issuance of the summons and alleged that he was informed and believed and upon such information and belief charged the fact to be that a stockholders' meeting and a meeting of the Board of Directors of defendant corporation would be held in the very near future for the purpose of electing directors and declaring a dividend on the outstanding stock. The prayer was that Brice be enjoined from disposing of or assigning the 25 shares of stock; from voting the stock; and that defendant corporation be enjoined from paying Brice any dividend on the 25 shares that might be declared by the Board of Directors. April 13, the court entered the order which is appended from in which it is recited that the motion of Plaintiff came on for hearing, the court read and considered the complaint, the verified petition and the prayer for an injunction and the court having heard arguments of counsel, it was ordered that a writ of injunction issue restraining Brice from selling or transferring any part of the 25 shares of stock and that he be enjoined from voting & 1/4 shares of the stock. The order further enjoined defendant corporation from paying Brice any dividend on the 25 shares that might be declared by the directors. The injunction was to be in effect until the further order of court.

April 16, 1943, the court on motion of the solicitor of defendant Brice, entered an order fixing Brice's appeal bond to secure the costs of appeal at \$250. Three days later the bond was approved by the

The next that appears in the record is an order entered April 26, denying defendant Brice's motion to strike from the order of April 13, 1943, the words, "The court, having read and considered the complaint." April 27, the report of proceedings was filed which showed that on April 19, counsel for Brice moved for the approval of the appeal bond for \$250 and the further motion to strike the words above quoted from the order of April 13. A colloquy then took place between court and counsel in which the court stated that he specifically remembered examining the complaint.

Defendant Paul B. Brice alone appeals. His argument is to the effect that the only thing considered by the court, before entering the order appealed from, was the verified petition filed by plaintiff April 13; that the verified complaint filed April 7, was not before the court and was in no way considered and that the petition is wholly insufficient to warrant the entry of the order. The difficulty with this contention is that it is not borne out by the record. The order recites that the court read the verified complaint and the verified petition and in the report of the proceedings, the court specifically stated that he considered both the complaint and the petition. In these circumstances the contention of counsel for Brice cannot be entertained.

Counsel for Brice, in his argument, says that the petition filed by plaintiff was upon information and belief only and this is insufficient to warrant the issuance of an injunction. He further complains that no copy of the bill was served upon defendants; that the order which the court was about to sign, enjoining defendants, etc., had not been shown to him.

The complaint was filed April 7, the defendants were served by the sheriff the same day and on April 9 counsel for plaintiff served the notice that on the 13th of April they would apply for an order injoining defendants, etc. During this period nothing appears to have been done by counsel. Afterward the court, on motion of counsel for Brice, fixed the amount of the appeal bond and April 26, denied

The next that appears in the record is an order entered April 28, denying defendant Brice's motion to strike from the order of April 13, 1943, the words, "The court, having read and considered the complaint." April 27, the report of proceedings was filed which showed that on April 18, counsel for Brice moved for the approval of the appeal bond for \$250 and the further motion to strike the words above quoted from the order of April 13. A colloquy then took place between court and counsel in which the court stated that he specifically remembered examining the complaint.

Defendant Paul B. Brice alone appeals. His argument is to the effect that the only thing considered by the court, before entering the order appealed from, was the verified petition filed by plaintiff April 13; that the verified complaint filed April 7, was not before the court and was in no way considered and that the petition is wholly insufficient to warrant the entry of the order. The difficulty with this contention is that it is not borne out by the record. The order recites that the court read the verified complaint and the verified petition and in the report of the proceedings, the court specifically stated that he considered both the complaint and the petition. In these circumstances the contention of counsel for Brice cannot be entertained.

Counsel for Brice, in his argument, says that the petition filed by plaintiff was upon information and belief only and this is insufficient to warrant the issuance of an injunction. He further complains that no copy of the bill was served upon defendants; that the order which the court was about to sign, enjoining defendants, etc., had not been shown to him.

The complaint was filed April 7, the defendants were served by the sheriff the same day and on April 9 counsel for plaintiff served the notice that on the 13th of April they would apply for an order enjoining defendants, etc. During this period nothing appears to have been done by counsel. Afterward the court, on motion of counsel for Brice, fixed the amount of the appeal bond and April 28, denied

4.

defendant's motion to strike from the restraining order the recital that the court had read and considered the complaint.

In these circumstances we think defendant ought not now contend that he was prejudiced by not having a copy of the complaint served on him by counsel for plaintiff nor was it reversibly erroneous to enter the order without submitting it to defendant's counsel. The complaint, the petition, and the order are all very brief and could be examined in a very few minutes.

Brice was enjoined from disposing of the 25 shares of stock and from voting $6 \frac{1}{4}$ of those shares, being plaintiff's 25% interest of such shares. If a meeting of the stockholders had been called, Brice could have voted his $18 \frac{3}{4}$ shares of stock without violating the injunctive order and the meeting of directors might properly be held without in any way conflicting with the order. Defendant corporation was enjoined not from holding a meeting of the stockholders and directors, but only from paying any dividends to Brice which might be declared on the 25 shares of stock. Whether the meeting of the directors was held and a dividend declared does not appear.

"Balance of Convenience. - On an application for an interlocutory injunction the court will always consider the balance of convenience; *** it will consider whether a greater injury would be done by granting an injunction than would result from a refusal." 16 Amer. and Eng. Ency. of Law, 2d Ed. p. 363.

Whether defendant should have been enjoined from selling the 25 shares of stock which were evidenced by one stock certificate or whether he should have been enjoined from selling only the $6 \frac{1}{4}$ shares, in view of all the circumstances, we think was within the discretion of the chancellor.

We are further of opinion, however, that the injunction was too broad. It should not have enjoined the payment of any dividend that might be declared to Brice on the $18 \frac{3}{4}$ shares which unquestionably belonged to him but should only have enjoined the payment to Brice

defendant's motion to strike from the restraining order the recital that the court had read and considered the complaint.

In these circumstances we think defendant ought not now contend that he was prejudiced by not having a copy of the complaint served

on him by counsel for plaintiff nor was it reversibly erroneous to enter the order without submitting it to defendant's counsel. The

complaint, the petition, and the order are all very brief and could be examined in a very few minutes.

Brice was enjoined from disposing of the 25 shares of stock and from voting 8 1/4 of those shares, being plaintiff's 25% interest

of such shares. If a meeting of the stockholders had been called, Brice could have voted his 18 3/4 shares of stock without violating

the injunctive order and the meeting of directors might properly be held without in any way conflicting with the order. Defendant

corporation was enjoined not from holding a meeting of the stockholders and directors but only from paying any dividends to Brice

which might be declared on the 25 shares of stock. Whether the meeting of the directors was held and a dividend declared does not

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very injunctive the court will always consider the balance of convenience; "it will consider whether a greater injury would

be done by granting an injunction than would result from a refusal." 18 Am. and Eng. Ency. of Law, 2d ed. p. 368.

Whether defendant should have been enjoined from selling the 25 shares of stock which were evidenced by one stock certificate

or whether he should have been enjoined from selling only the 8 1/4 shares, in view of all the circumstances, we think was within the

discretion of the chancellor. We are further of opinion, however, that the injunction was too

broad. It should not have enjoined the payment of any dividend that might be declared to Brice on the 18 3/4 shares which undoubtedly belonged to him but should only have enjoined the payment to Brice

5.

of any such dividend as might be declared on the 6 1/4 shares which belonged to plaintiff.

The order of the Circuit court appealed from will be affirmed in part and reversed in part so that it may be modified by the chancellor in accordance with what we have said. Each side will be required to pay his own costs.

ORDER AFFIRMED IN PART, REVERSED IN
PART AND REMANDED.

Matchett, J., concurs.

of any such dividend as might be declared on the 6 1/4 shares

which belonged to plaintiff.

The order of the Circuit Court appealed from will be affirmed

in part and reversed in part so that it may be modified by the
 Chancellor in accordance with what we have said. Each side will
 be required to pay his own costs.

ORDER AFFIRMED IN PART, REVERSED IN
 PART AND REMANDED.

Watson, J., concurs.

42160

PEOPLE OF THE STATE OF ILLINOIS,)

Defendant in Error,

v.

R. TAYLOR,

Plaintiff in Error.

WRIT OF ERROR TO

MUNICIPAL COURT

OF CHICAGO.

Honorable Oscar S. Caplan,
Trial Judge.

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

It appears from the brief that the instant case, No.

42160, and case No. 42161, were consolidated for hearing in this court by leave granted, and are here on writs of error to the Municipal Court of Chicago only for review of the judgment orders that were entered.

319 I.A. 333

No complaint has been made that the accused have not had a full, fair and impartial trial or that errors of law intervened in any proceeding up to the entry of the judgment.

It is called to our attention that the sole ground for this review is based upon the theory that the judgment orders in the instant cases are void because they contain the language, "It is considered and adjudged by the court that said defendant is guilty of the criminal offense of 'gambling' on said finding of guilty". The finding of the trial court appearing in each of the records is "guilty in manner and form as charged in the information herein". The informations charge, except for the names, location and formal parts, as follows:

"Did then and there, keep a room on the premises located at to-wit: 223 N. Clark St., in the City of Chicago, County of Cook, State of Illinois, with a book for the purpose of recording and registering bets and wagers upon the result of a trial, or contest of the speed of a beast to-wit: a horse, in violation of Sec. 336, Chapter 38, Illinois Revised Statutes of 1937."

The plaintiffs in error contend that the judgments are void because the words "guilty of the criminal offense of 'gambling' on said finding of guilty" are not responsive to the offense charged or to the finding of the court and hence do not indicate an act which is a crime or misdemeanor under the State laws.

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

R. TAYLOR,

Plaintiff in Error.

MR. JUSTICE WHEELER DELIVERED THE OPINION:

It appears from the brief that the instant case, No.

42180, and case No. 42181, were assigned for opinion in this

court by leave granted, and are here on writ of error to the

Municipal Court of Chicago only for review of the judgment entered

that were entered.

No complaint has been made that the record is not a

full, fair and impartial trial or that error of law intervened

in any proceeding up to the entry of the judgment.

It is called to our attention that the rule found for

this review is based upon the theory that the judgment entered in

the instant cases are void because they contain the error

"It is considered and adjudged by the court that the judgment is

guilty of the criminal offense of 'perjury' on each of the

guilty". The finding of the trial court appearing in each of the

records is "guilty in manner and form as charged in the indictment

herein". The information charges, each for the same offense,

and formal parts, as follows:

"And then and there, being a person on the premises of the
at to-wit: 232 S. Clark St., in the City of Chicago, County of Cook,
State of Illinois, with a book for the purpose of carrying and
registering bets and wagers upon the result of a trial, on each
of the speed of a boat to-wit: a horse, in violation of sec. 432,
Chapter 32, Illinois Revised Statutes of 1907."

The plaintiff in error contends that the judgment is

void because the words "guilty of the criminal offense of 'perjury'"

on said finding of "guilty" are not responsive to the offense charged

or to the finding of the court and hence is not entitled to an

which is a crime or misdemeanor under the State laws.

The contention of the plaintiffs in error is subdivided into nine propositions on which argument is advanced on seven. Plaintiffs in error have not supported either their claim or argument with a single case in point. Both by their abstract and their brief they admit the record is free from error except in the form of the judgment. Hence it is suggested that the most that the plaintiffs in error could hope for by this review is that the causes be remanded with directions to enter proper judgments, if the same are improper. People v. Wood, 318 Ill. 388; Hoch v. People, 219 Ill. 265. It is then the suggestion of the defendant in error on the questions that are involved that the instant judgments are not void, and it is pointed out, first, that the rule as to the requisites and sufficiency of a record of judgment is, that in determining the sufficiency of a verdict and a judgment of conviction based thereon, the entire record will be searched and all parts of the record interpreted together and a deficiency at one place may be cured by what appears at another, citing People v. Hill, 345 Ill. 103 at page 109 and cases cited, and White v. U. S. 17 S. Ct. Rep. 38. And again, a judgment in a criminal case need not specify the offense if shown elsewhere in the record, citing Battle v. State, 110 So. 323 and People v. Roth, 185 Ill. App. 162. Secondly, the defendant in error argues that the verdict or finding of the court determines not only the character of the crime but also the imprisonment, citing People v. Hill, 345 Ill. 103; and, thirdly, that the words "of the criminal offense of gambling" may be wholly disregarded as surplusage because this court said in People v. Paul, 167 Ill. App. 557, at 560, a pandering case:

"The fact that through carelessness, inadvertence or ignorance the record is made to say that plaintiff in error 'is guilty of the criminal offense of causing, inducing, persuading or encouraging a female person to become an inmate of a house of prostitution, on said plea of guilty', does not change the effect of the plea of plaintiff in error, theretofore entered, to the information. The portion of the record last quoted may be wholly disregarded as surplusage. The judgment of conviction was upon the plea to the information alone, and is responsive to such plea."

The trial in this case was by the court without a jury

The contention of the defendant in error is that

into nine propositions on which argument is made on error.

Plaintiff in error have not introduced sufficient evidence to

argument with a single case in point. Both by reason of the

and their brief they state the record is that the error is

in the form of the judgment. Hence it is suggested that the record

that the plaintiff in error could have been fully satisfied

that the cause be remanded with directions to enter a proper judgment.

If the same are improper. People v. Wood, 113 Ill. 322; People v.

People, 219 Ill. 283. It is then the suggestion is that the

in error on the questions that are involved that the first judgment

is not void, and it is pointed out, that, while the

to the rescripts and sufficiency of a record of judgment is, that

in determining the sufficiency of a verdict and a judgment of

conviction based thereon, the entire record will be searched and

all parts of the record interpreted together and a sufficiency of

one place may be cured by what appears at another, citing People v.

People, 243 Ill. 103 at page 109 and cases cited, and People v. L.

17 2d. 387. And again, judgment is a judicial act and

not specify the offense it shows appearing in the record, citing

Battle v. State, 110 Ill. 323 and People v. People, 122 Ill. 323.

Secondly, the defendant in error argues that the verdict on finding

of the court determines not only the character of the crime but

also the punishment, citing People v. People, 122 Ill. 323; and

thirdly, that the words "of the criminal offense of" "being," may

be wholly disregarded as unnecessary because this court said in

People v. Paul, 127 Ill. App. 337, at 340, a reversing case:

"The fact that through carelessness, inadvertence or ignorance the record is made to say that plaintiff in error 'is guilty of the criminal offense of causing, inducing, persuading or encouraging a female person to become an inmate of a house of prostitution, on said plea of guilty,' does not change the effect of the plea of plaintiff in error, therefore entered, to the information. The portion of the record last quoted may be wholly disregarded as surplusage. The judgment of conviction was upon the plea to the information alone, and is responsive to such plea."

The trial in this case was by the court without a jury.

and from the record it appears that the court after hearing the testimony of witnesses and argument of counsel entered the following judgment: "It is considered and adjudged by the court that said defendant is guilty of the criminal offense of 'gambling' on said finding of guilty". And, "It is considered, ordered and adjudged that said defendant because of said judgment of guilty, be and he is hereby sentenced to confinement in the county jail of Cook County, Illinois, for the term of five (5) days, and that costs be recovered from defendant." The motion for a new trial which was entered was overruled.

The facts that we believe to be important for the purpose of disposing of the questions here involved are: That the defendant had a full, fair and impartial trial; that no errors of law intervened, and, for the reasons stated, he will not be accorded a new trial because of an alleged improper judgment, but the trial court will be directed to re-sentence the defendants by formal judgment.

A case that might be of value in consideration of the instant cases is entitled People v. Wood, 318 Ill. 388, where the Supreme Court said:

"The verdict found plaintiff in error 'guilty of incest in manner and form as charged in the indictment.' The crime with which plaintiff in error was charged is that defined by section 156 of the Criminal Code, and the punishment fixed by that section for its violation is imprisonment in the penitentiary for a term of not less than one year and not exceeding twenty years. The judgment entered in this case does not sentence plaintiff in error to imprisonment in the Southern Illinois Penitentiary or in any other penal institution in the State of Illinois. It merely directs the sheriff to deliver the prisoner to the warden of the penitentiary at Chester and commands the warden to confine the prisoner in safe and secure custody. This is not sufficient. The judgment must definitely fix the place of imprisonment and the place must be one fixed by law. The judgment not only fails to fix the place of imprisonment but it does not in any manner fix the term of imprisonment. By virtue of the provisions of the act of 1917 in relation to the sentence of persons convicted of crime, the judgment of the court should have been a general sentence of imprisonment in the Southern Illinois Penitentiary for a term not exceeding twenty years. (Smith's Stat. 1923, p. 739.) The term fixed by the section of the Criminal Code relating to the crime of which the prisoner stands convicted is read into every judgment, but it is necessary to state in the judgment the name of the crime, or so describe it that it can be identified by the warden. * * *

"Plaintiff in error having been accorded a full, fair and impartial trial upon which no errors of law intervened and a legal verdict having been returned against him, he is not entitled to another trial merely because of the error committed by the court in entering judgment. (People v. Boer, 262 Ill. 152; People v. Rardin, 255 id. 9; Wallace v. People, 159 id. 446)."

The court in conclusion stated that the judgment was reversed and the cause remanded to the Circuit Court of Pulaski County with leave to the State's attorney to move the court for the entry of a proper judgment upon the verdict and with directions to the court to allow such motion and re-sentence plaintiff in error.

Upon a like question is the case of People v. White, 377 Ill. 251. In that case on the hearing of a petition to vacate a judgment of conviction, one of the contentions being that the defendant was not represented by counsel, it was held that the court's denial of the petition will not be reversed because the court expressed an opinion that the defendant's statement that he was not represented by counsel was untrue, the petition being heard by the same judge who presided at the trial without a jury and his opinion evidently being based on his own recollection of the proceedings. The court said on the questions involved:

"Where the judgment order fails to define clearly the limits of sentences intended to run consecutively, or requires the aid of a court for its construction, the cause should be remanded for the imposition of a proper sentence." (People v. Welch, 331 Ill. 20; People v. Elliott, 272 id. 592). The record was free from error except in the form of the judgment, and the Appellate Court properly remanded the cause so that a proper judgment order could be entered."

So upon consideration of the facts in the record as we have it before us, it is apparent that the defendants had a full, fair and impartial trial and there were no errors that intervened that would justify reversal, except that the cause be remanded to the trial court to re-sentence the defendants by a proper judgment which is to be in accordance with the findings that were entered by the court at the time of the trial.

The judgment in this case will be reversed and the cause will be remanded to enter a judgment in accordance with the finding that was entered by the court on the hearing.

REVERSED AND REMANDED WITH DIRECTIONS THAT
THE COURT ENTER A JUDGMENT UPON THE COURT'S
FINDINGS.

BURKE, P.J. AND KILEY, J. CONCUR.

The Government in this case will be advised and the
course will be determined to secure a judgment in the case of the
finding that was entered on the 15th day of June, 1914.

Very truly yours,
J. Edgar Hoover
Special Agent in Charge

BUREAU OF INVESTIGATION, U. S. DEPARTMENT OF JUSTICE

42161

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

J. JABLONSKI,

Plaintiff in Error.

WRIT OF ERROR TO
MUNICIPAL COURT
OF CHICAGO.

Honorable Oscar S. Caplan,
Trial Judge.

319 I.A. 639

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

In the instant case the facts that were before the court at the time of the hearing were of substantially like character to the facts heard by the court in the case of People of the State of Illinois, Defendant in Error v. R. Taylor, Plaintiff in Error, Case, 42160. The plaintiff in error contended that the judgment was void because the words "It is considered and adjudged by the court that said defendant is guilty of the criminal offense of 'gambling' on said finding of guilty", are not responsive to the offense charged or to the findings of the court and hence do not indicate an act which is a crime or misdemeanor under the law, as indicated in the Taylor case. After hearing the testimony of witnesses and arguments of counsel, the court entered the following finding: "The court finds the defendant guilty in manner and form as charged in the information herein." The judgment of the court was as follows: "It is considered, and adjudged by the court that said defendant is guilty of the criminal offense of 'gambling' on said finding of guilty." And, "It is considered, ordered and adjudged that said defendant because of said judgment of guilty, be and he is hereby sentenced to confinement in the county jail of Cook County, Illinois, for the term of five (5) days, and that costs be recovered from defendant."

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in error,

v.

J. JABLONSKI,

Plaintiff in error.

Honorable Circuit Court,
Cook County, Illinois.

MR. JUSTICE RUSSELL WELLS, Chief Justice of the Court.

In the instant case the facts that were before the court

at the time of the hearing were of substantially like character

to the facts heard by the court in the case of People of theState of Illinois, Defendant in error v. E. Taylor, Plaintiff inError, Case, 42160. The plaintiff in error contended that the

judgment was void because the words "it is considered and

adjudged by the court that said defendant is guilty of the

criminal offense of 'gambling' on said finding of guilty," are

not responsive to the offense charged or to the findings of the

court and hence do not indicate an act which is a crime or mis-

demeanor under the law, as indicated in the Taylor case. After

hearing the testimony of witnesses and arguments of counsel, the

court entered the following finding: "The court finds the

defendant guilty in manner and form as charged in the indictment

herein." The judgment of the court was as follows: "It is

considered, and adjudged by the court that said defendant is

guilty of the criminal offense of 'gambling' on said finding of

guilty." And, "It is considered, ordered and adjudged that said

defendant because of said judgment of guilty, be and he is hereby

sentenced to confinement in the county jail of Cook County, Illinois,

for the term of five (5) days, and that costs be recovered from

defendant."

In the discussion of the merits of this case we were controlled in a measure by the Supreme Court in its decision in the case of People v. Wood, 318 Ill. 388, and in the case of People v. White, 377 Ill. 251, and it is apparent that the defendant had a full, fair and impartial trial upon which no errors of law intervened and that he is not entitled to nor is he to be accorded a new trial because of an alleged improper judgment, but the trial court will be directed to re-sentence the defendant by proper judgment in the matter.

So, having reached the conclusion which is in accord with that in the case of People v. Taylor, 42160, it is our opinion that the finding is affirmed and the judgment is reversed and remanded with directions to enter judgment in accordance with the finding, and such will be the order.

REVERSED AND REMANDED WITH DIRECTIONS
THAT THE COURT ENTER A JUDGMENT UPON
THE COURT'S FINDINGS.

BURKE, P.J. AND KILEY, J. CONCUR.

In the discussion of the merits of this case we were controlled in a measure by the Supreme Court in its decision in the case of People v. Wood, 318 Ill. 386, and in the case of People v. White, 327 Ill. 351, and it is evident that the defendant had a full, fair and impartial trial upon which no errors of law intervened and in fact he is not entitled to any new trial because of an alleged improper judgment, but the trial court will be directed to re-sentence the defendant by proper judgment in the matter.

So, having reached the conclusion which is in accord with that in the case of People v. Taylor, 413 Ill. 413, it is our opinion that the finding is affirmed and the judgment is reversed and remanded with directions to enter judgment in accordance with the finding, and each will be the order.

REVEREND AND HONORABLE JUSTICES OF THE
COURT OF THE STATE OF ILLINOIS
THE COURT FINDS:

BURKE, P. J. AND KILLY, J. CONCUR.

41879

RUTH WALKER SEWELL,
Appellee,

v.

ARTHUR SEWELL,
Defendant below.

ALVA L. BATES,
Petitioner below,
Appellant.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

433

172

319 172 640

MR. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court.

Ruth Walker Sewell employed Attorney Alva L. Bates to file a complaint in her behalf against her husband Arthur Sewell for separate maintenance. She was granted a decree of separate maintenance on September 30, 1937. After the entry of said decree Attorney Bates continued to represent Mrs. Sewell in proceedings to enforce the provisions thereof relating to the payment of alimony and solicitor's fees. Under circumstances hereinafter shown Mrs. Sewell discharged Alva L. Bates as her attorney. Having thereafter arranged a property settlement with her husband through Attorney Henry C. Ferguson, Mrs. Sewell filed an amended complaint asking a divorce from Arthur Sewell. A decree which incorporated a property settlement agreement, was entered on January 2, 1940 granting her a divorce. After the evidence was heard in the divorce proceeding and prior to the entry of the decree therein, Alva L. Bates filed a petition on December 27, 1939 in said divorce proceeding, asking that he be allowed attorney's fees for certain services claimed to have been theretofore rendered by him to Mrs. Sewell. Alva L. Bates' petition as amended for the allowance of attorney's fees and the answers thereto of Ruth Walker Sewell and Arthur Sewell were referred and re-referred to a special commissioner for hearing and he was directed to report his conclusions of fact and law to the court. The special commission-

RUTH WALKER SEWELL,
Appellee,

v.

ARTHUR SEWELL,
Defendant below.

ALVA L. BATES,
Petitioner below,
Appellant.

APPEAL FROM SUPERIOR COURT,
COCK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court.

Ruth Walker Sewell employed Attorney Alva L. Bates to file a complaint in her behalf against her husband Arthur Sewell for separate maintenance. She was granted a decree of separate maintenance on September 30, 1937. After the entry of said decree Attorney Bates continued to represent Mrs. Sewell in proceedings to enforce the provisions thereof relating to the payment of alimony and solicitor's fees. Under circumstances hereinafter shown Mrs. Sewell discharged Alva L. Bates as her attorney. Having thereafter arranged a property settlement with her husband through Attorney Henry C. Ferguson, Mrs. Sewell filed an amended complaint asking a divorce from Arthur Sewell. A decree which incorporated a property settlement agreement, was entered on January 2, 1940 granting her a divorce. After the evidence was heard in the divorce proceeding and prior to the entry of the decree therein, Alva L. Bates filed a petition on December 27, 1939 in said divorce proceeding, asking that he be allowed attorney's fees for certain services claimed to have been theretofore rendered by him to Mrs. Sewell. Alva L. Bates' petition as amended for the allowance of attorney's fees and the answers thereto of Ruth Walker Sewell and Arthur Sewell were referred and re-referred to a special commissioner for hearing and he was directed to report his conclusions of fact and law to the court. The special commissioner

er recommended that the claims of Alva L. Bates for attorney's fees be allowed in part and denied in part and that said attorney be charged with one-half of the costs of the references. The trial court entered a decree which approved the recommendations of the special commissioner. Alva L. Bates appeals from the decree in so far as it refused to allow certain of his claims for attorney's fees and from that portion of the decree which ordered him to pay one-half the costs of the references to the special commissioner. Ruth Walker Sewell filed a cross-appeal asserting that Alva L. Bates was not entitled to the allowance of any attorney's fees except \$325, which amount she admitted she owed him, and that he should be charged with the entire costs of the references. Hereinafter Ruth Walker Sewell will be sometimes referred to as plaintiff, Arthur Sewell as defendant and Alva L. Bates as petitioner.

As already stated the petition of Alva L. Bates for attorney's fees was filed in the divorce proceeding after the evidence had been heard therein and shortly before the entry of the decree of divorce on January 2, 1940. Attorney Bates' original petition alleged that "there is now due and owing to your petitioner from Mrs. Sewell, as and for his attorney's fees for services rendered in her behalf, the sum of \$325.00, being the balance due of the sum of \$600.00 allowed by the trial court and affirmed by the Appellate Court for the services rendered by your petitioner in the separate maintenance suit aforesaid, and a further reasonable sum as compensation for services rendered in the negotiations respecting a property settlement between Mr. and Mrs. Sewell"; and that he was entitled to an attorney's lien against the deposit made by Sewell with the clerk of the court in the divorce proceeding to the extent of such fees as might be allowed him in connection with any property settlement made between plaintiff and defendant. Pursuant to order of court Sewell deposited with the clerk of the court \$2500, which amount the settlement agreement provided he was to pay plaintiff "as and for her attor-

neys' fees."

Thereafter Alva L. Bates filed the following amendment to his aforesaid petition:

"By inserting after paragraph nineteen (19) of said petition the paragraph following:

"19 1/2. That the decree entered in this cause September 30, 1937, allowed attorneys' fees to the plaintiff in the sum of \$600.00 for legal services rendered to the plaintiff up to the date of the entry of said decree. That since the entry of said decree your petitioner has rendered a vast amount of legal services in this cause to the plaintiff, in the Superior Court of Cook County, respecting the enforcement of the terms of the said decree; that he drafted and prepared several rules upon the defendant to show cause, appeared in court upon the contest of said rules, and spent many days investigating the law applicable to the facts and circumstances respecting said rules. That your petitioner has never received any monies whatsoever from any source for said legal services rendered to the plaintiff, and that he is entitled to a fair and reasonable compensation for said services, and that said compensation and allowance ought to be fixed by this court.

"By striking out paragraph Twenty (20) of said petition and inserting in its place and stead the paragraph following:

"20. That there is now due and owing to your petitioner from Mrs. Sewell, as and for his attorneys' fees for services rendered in her behalf, the sum of \$325.00, being the balance due of the sum of \$600.00 allowed by the trial court and affirmed by the Appellate Court for the services rendered by your petitioner in the separate maintenance suit up to September 30, 1937; and such further reasonable sum as the court may allow for the services rendered since the entry of said decree and as set forth in paragraph 19 1/2 herein; and such further reasonable sum as compensation for services rendered the plaintiff in the negotiations respecting a property settlement between Mr. and Mrs. Sewell."

neys' fees."

Thereafter Mrs. M. Bates filed the following amendment

to his aforesaid petition:

"By inserting after paragraph nineteen (19) of said pe-

tition the paragraph following:

"In 1913, That the decree entered in this cause before-

per 30, 1937, allowed attorneys' fees to the plaintiff in the sum

of \$800.00 for legal services rendered to the plaintiff up to the

date of the entry of said decree. That since the entry of said de-

creed your petitioner has rendered a vast amount of legal services

in this cause to the plaintiff, in the Superior Court of Cook Coun-

ty, respecting the enforcement of the terms of the said decree;

that he drafted and prepared several rules upon the defendant to

show cause, appeared in court upon the contest of said rules, and

spent many days investigating the law applicable to the facts and

circumstances respecting said rules. That your petitioner has nev-

er received any monies whatsoever from any source for said legal

services rendered to the plaintiff, and that he is entitled to a

fair and reasonable compensation for said services, and that said

compensation and allowance ought to be fixed by this court.

"By striking out paragraph Twenty (20) of said petition

and inserting in its place and stead the paragraph following:

"30. That there is now due and owing to your petition-

er from Mrs. Sewell, as and for his attorneys' fees for services

rendered in her behalf, the sum of \$283.00, being the balance due of

the sum of \$800.00 allowed by the trial court and affirmed by the

Appellate Court for the services rendered by your petitioner in

the separate maintenance suit up to September 30, 1937; and such

further reasonable sum as the court may allow for the services ren-

dered since the entry of said decree and as set forth in paragraph

19 1/2 herein; and such further reasonable sum as compensation for

services rendered the plaintiff in the negotiations respecting a

property settlement between Mr. and Mrs. Sewell."

Plaintiff's answer admitted that she owed Attorney Bates \$325, which was the balance due on the ^{\$600} attorney's fees allowed ~~to~~ by the decree of separate maintenance. Her answer then denied that he was entitled to an allowance of any other attorney's fees and also denied that he was entitled to an attorney's lien on the money deposited with the clerk of the court by defendant,

Defendant's answer was as follows:

"1. This respondent admits that he received a copy of the notice of attorney's lien set forth in the petition of said Alva L. Bates.

"2. This respondent further states that on the 26th day of December, A. D. 1939, he entered into an agreement with the said Ruth Walker Sewell wherein and whereby he agreed, in the event the court granted her a divorce in this cause, to pay unto her the sum of Fifteen Thousand Dollars (\$15,000) in lieu of all alimony and dower that she may have in and to his estate and also to pay to the said Ruth Walker Sewell the sum of Twenty-five Hundred Dollars (\$2,500) as and for her attorneys' fees.

"3. This respondent further states that no part of said funds has, as yet, been paid to the said Ruth Walker Sewell pending the hearing by this court of the amended bill of complaint for divorce and the answer filed thereto by this respondent.

"4. This respondent further states that he is ready and willing to abide by all orders of this court in connection with the matters and things contained in the petition of Alva L. Bates."

The decree of divorce adjudged that Sewell's payment of \$15,000 to plaintiff and his deposit of \$2,500 with the clerk of the court discharged him of all claims that plaintiff had against him including claims for attorney's fees.

For a clearer understanding of the questions involved herein it is necessary to review the evidence presented to the special commissioner concerning the relationship of attorney and client

commissioner concerning the relationship of attorney and client in it is necessary to review the evidence presented to the special For a clearer understanding of the questions involved here- him including claims for attorney's fees.

The decree of divorce adjudged that Sewell's payment of \$12,000 to plaintiff and his deposit of \$2,500 with the clerk of the court discharged him of all claims that plaintiff had against

the matters and things contained in the petition of Alva I. Bates." 4. This respondent further states that he is ready and willing to abide by all orders of this court in connection with the hearing by this court of the amended bill of complaint for divorce and the answer filed thereto by this respondent. funds has, as yet, been paid to the said Ruth Walker Sewell and- 3. This respondent further states that no part of said Hundred Dollars (\$2,500) as and for her attorney's fees.

to pay to the said Ruth Walker Sewell the sum of twenty-five her the sum of fifteen thousand Dollars (\$15,000) in lieu of all alimony and dower that she may have in and to his estate and also event the court granted her a divorce in this case, to pay unto said Ruth Walker Sewell wherein and whereby he agreed, in the of December, A. D. 1939, he entered into an agreement with the "2. This respondent further states that on the 26th day I. Bates.

"1. This respondent admits that he received a copy of the notice of attorney's lien set forth in the petition of said Alva Defendant's answer was as follows:

and also denied that he was entitled to an attorney's lien on that he was entitled to an allowance of any other attorney's fees by the decree of separate maintenance. Her answer then denied \$325, which was the balance due on the attorney's fees allowed Plaintiff's answer admitted that she owed attorney fees

between Alva L. Bates and Ruth Walker Sewell since the inception of said relationship.

It is undisputed that when Ruth Walker Sewell employed Alva L. Bates as her attorney in the separate maintenance proceeding, it was agreed between them that since Mrs. Sewell had no money or property, Attorney Bates would have to procure from her husband, Arthur Sewell, such fees as he was entitled to receive as her attorney in that proceeding. As heretofore shown the original complaint filed in this cause asked for separate maintenance and a decree was entered September 30, 1937, granting plaintiff Ruth Walker Sewell separate maintenance from defendant Arthur Sewell. This decree awarded plaintiff \$75 a month alimony and \$600 attorney's fees, the latter payable in installments of \$50 monthly. The first monthly payment of alimony and attorney's fees was due under the decree on October 1, 1937. Defendant failed and refused to make such payment. Plaintiff through her attorney procured a rule to show cause against Sewell and when his commitment was imminent he paid the \$75 alimony and \$50 installment then due on plaintiff's attorney's fee. Thereafter Sewell wilfully refused to make the payments for alimony and attorney's fees for the months of November and December, 1937, as ordered by the decree of separate maintenance. Attorney Bates in plaintiff's behalf procured an order for Sewell's commitment for such wilful refusal. Sewell appealed from this order of commitment and from the decree of separate maintenance. On December 28, 1937 attorney Bates procured an order directing Sewell to pay plaintiff \$250 attorney's fees to defend against said appeal and defendant was also ordered to pay plaintiff \$50 for the printing of her Appellate court brief as well as \$10 for her appearance fee in said court. When said payments were not made as ordered, attorney Bates caused an order of commitment to be entered against Sewell February 4, 1938. Sewell appealed from this order and this second appeal was consolidated

between Alice M. Bates and Arthur Sewell, Jr. in the
of said relationship.

It is undisputed that when Alice M. Bates was
Alice M. Bates as her attorney in the separate maintenance pro-
ceeding, it was agreed between them that Alice M. Bates had
no money or property. Attorney Bates would have to procure from
her husband, Arthur Sewell, such fees as he was entitled to receive
as her attorney in that proceeding. As her attorney under the original
complaint filed in this case and for separate maintenance and a
decree was entered September 26, 1937, granting plaintiff's claim for
Sewell separate maintenance from defendant Arthur Sewell. This
decree awarded plaintiff \$75 a month alimony and \$500 attorney's
fees, the latter payable in installments of \$50 monthly. The first
monthly payment of alimony and attorney's fees was due under the
decree on October 1, 1937. Defendant failed and refused to make
such payment. Plaintiff through her attorney procured a writ to
show cause against Sewell and when his compliance was imminent he
paid the \$75 alimony and \$50 installment then due on October 15
attorney's fee. Thereafter Sewell willingly refused to make the
payments for alimony and attorney's fees for the months of
November and December, 1937, as ordered by the decree of separate
maintenance. Attorney Bates in plaintiff's behalf procured an
order for Sewell's commitment for such writful refusal. Sewell
appealed from this order of commitment and from the decree of
separate maintenance. On December 26, 1937 attorney Bates procured
an order directing Sewell to pay plaintiff \$250 at once, to wit
defendant against said appeal and defendant was also ordered to pay
plaintiff \$20 for the printing of her appeal to court. Sewell
well as \$10 for her appearance fee in said court. When said ap-
peals were not made as ordered, attorney Bates caused an order of
commitment to be entered against Sewell February 4, 1938. Sewell
appealed from this order and this second appeal was consolidated

for hearing in this court with the first appeal. On March 1, 1938 Attorney Bates filed a petition for temporary alimony pending the disposition of the consolidated appeals and also for the allowance to plaintiff of attorney's fees to defend against the second appeal. The hearing on this petition was continued to March 5, 1938, when Attorney Bates appeared in court and with plaintiff's consent entered into a written agreement with defendant which provided that plaintiff would be paid \$62.50 a month as temporary alimony until the appeals were decided, said temporary alimony to be applied in payment pro tanto of any alimony the Appellate court should find to be due plaintiff and which also provided for the payment to plaintiff of \$150 as attorney's fees to defend against the second appeal. Attorney Bates received this \$150 and plaintiff was paid \$62.50 per month as temporary alimony from January, 1938 until August, 1938. It should be stated at this point that it was necessary for Attorney Bates to file only one brief in this court, since the two appeals were consolidated and the questions concerning the propriety of the orders for defendant's commitment were the same in both appeals. Shortly prior to the aforesaid agreement Attorney Bates induced plaintiff to agree to pay him \$17.50 a month out of her \$62.50 temporary alimony to be applied against the \$600 attorney's fees allowed under the decree of separate maintenance. It is agreed in this regard that plaintiff paid petitioner \$125 and that, deducting this amount and certain other payments which he received, she still owes him a balance of \$325 on the \$600 allowed by the separate maintenance decree for his attorney's fees. Attorney Bates concedes that he performed no legal services in the trial court in connection with the enforcement of the decree of separate maintenance after March 5, 1938, when he received \$150 attorney's fees to defend against the second appeal. Both appeals were decided adversely to Sewell on November 17, 1938, the decree of separate maintenance and orders of commitment being affirmed. Shortly

for hearing in this court with the first appeal, the court in 1936, January 7th, filed a petition for summary judgment and the disposition of the case was postponed until the second appeal. The hearing on this petition was postponed to March 7, 1936, when summary judgment was entered with plaintiff's consent entered into a written agreement with defendant and which provided that plaintiff would be paid \$25.00 a month as temporary alimony until the appeals were decided, with temporary alimony to be applied in payment and discharge of any liability the Appellate court should find to be due. Plaintiff and which also provided for the payment to plaintiff of 1% of defendant's fees to defend against the second appeal. Defendant stated a second appeal was paid \$25.00 per month as temporary alimony from January, 1936 until August, 1936. It should be stated at this point that it was necessary for defendant to file only one brief in this court, since the two appeals were consolidated and the questions concerning the propriety of the order for defendant's commitment were the same in both appeals. Shortly prior to the aforesaid agreement, defendant had informed plaintiff to agree to pay him \$25.00 a month out of her \$25.00 temporary alimony to be applied against the \$25.00 a month's fee allowed under the decree of separate maintenance. It is agreed in this regard that plaintiff paid defendant \$25.00 and that, according to this amount and certain other payments which he received, and still owes him a balance of \$25.00 on the \$25.00 allowed by the court. Defendant's fees for his attorney's fees. Defendant also concedes that he performed no legal services in the trial court in connection with the enforcement of the decree of separate maintenance after March 7, 1936, when he received the court's order to defend against the second appeal. Both appeals were decided adversely to Sewell on November 14, 1936. The decree of separate maintenance and order of commitment being affirmed. Finally

thereafter the surety on Sewell's appeal bond paid the amount of alimony and solicitor's fees as well as other items of expense involved in the appeals. A proper distribution of the amount so paid by said surety was made between plaintiff and petitioner.

Alva L. Bates testified before the special commissioner that he told plaintiff on December 14, 1938, after he had paid her her share of the money received from the surety on defendant's appeal bond, that Louis Dennen, one of defendant's attorneys, had suggested a settlement of her property rights with Sewell; that he asked her what her attitude was in regard to a property settlement with her husband and what amount she would accept by way of such a settlement; that she told him she would accept \$10,000 as a minimum for herself and that he then asked her if she wanted him to take the matter up immediately with Mr. Dennen; that plaintiff then directed him to negotiate a settlement on that basis; that within a few days thereafter plaintiff telephoned him twice reiterating her desire that he consummate a settlement at once that would net her at least \$10,000; that he then telephoned plaintiff to come to his office; that when she arrived he suggested that "she sign a contract with him agreeing to accept \$10,000 as a minimum settlement and to pay him an attorney's fee of ten per cent of any amount procured by him by way of settlement in excess of said \$10,000 minimum;" that she refused to sign such a contract and said, "That isn't necessary; just go on as we have arranged;" that on or about December 23, 1938, plaintiff came to his office and charged him with withholding some of her funds; that an acrimonious discussion ensued, which was concluded by his statement, "You are an ingrate, Mrs. Sewell;" and that she thereupon left his office. Plaintiff's version of this occurrence was that she did make certain charges against petitioner concerning his handling of her money and that he said to her, "You go to hell *** you get to hell out of here and you got your damn nerve to come in

thereafter the money on Jewell's appeal went to the amount of
alimony and collector's fees as well as other items of expense
involved in the appeal. A power of attorney of the amount so
paid by said annuity was made between Jewell and Plaintiff.
Alva L. Jones testified before the special commissioner
that he told Plaintiff on December 14, 1938, after he had paid
her her share of the money received from the annuity on defendant's
appeal bond, that Louis Gorman, one of defendant's attorneys, had
suggested a settlement of her property rights with Jewell; that
he asked her what her attitude was in regard to a property settle-
ment with her husband and what amount she would accept by way of
such a settlement; that she told him she would accept \$10,000 as
a minimum for herself and that he then asked her if she wanted
him to take the matter up immediately with Mr. Gorman; that Plai-
ntiff then directed him to negotiate a settlement on that basis;
that within a few days thereafter Plaintiff telephoned him twice
reiterating her desire that he recommend a settlement at once
that would net her at least \$10,000; that he then telephoned Plai-
ntiff to come to his office; that when she arrived he suggested that
"she sign a contract with him agreeing to accept \$10,000 as a mini-
mum settlement and to pay him an attorney's fee of ten per cent of
any amount procured by him by way of settlement in case of said
\$10,000 minimum;" that she refused to sign such a contract and
said, "That isn't necessary; just go on as we have arranged";
that on or about December 22, 1938, Plaintiff came to his office
and changed him with withholding some of her funds; that an
amicable discussion ensued, which was concluded by his state-
ment, "You are an ingrate, Mrs. Jewell;" and that she thereupon
left his office. Plaintiff's version of this occurrence was that
she did make certain charges against Plaintiff concerning his
handling of her money and that he said to her, "You go to hell
and you get to hell out of here and you get your damn nerve to come in

here;" and that he also said that he "no longer wanted me for a client" and that "I will throw you out of here." She further testified that "I was so horrified at this language that I became frightened and I hurriedly got out" and that she also told him, "I don't want you to represent me any longer, so I hurried out of the office." According to Attorney Bates this controversy concerned the distribution of the money received from the surety on defendant's appeal bond. According to plaintiff it concerned the \$150 petitioner received to defend against the second appeal.

Attorney Bates further testified that shortly after the foregoing occurrence he received an offer of settlement from Attorney Dennen, whereupon he called plaintiff on the telephone, told her what Sewell's proposal was and asked her to come to his office; that she said "I am not coming in; I have not authorized you to make any negotiations respecting a property settlement;" and that she hung up the telephone.

Either the same day or the next day petitioner wrote the following letter to plaintiff:

"December 28, 1938.

Dear Mrs. Sewell:

Pursuant to your directions to negotiate a financial settlement with your husband, Arthur Sewell, I have been discussing the matter with Mr. Dennen of McKinley & Price, the attorneys for Mr. Sewell.

Mr. Dennen has proposed to me that you consider the acceptance of the premises known as number 4919 South Vincennes Avenue, Chicago, free and clear of any mortgage, together with cash in the sum of \$1,200.

As was agreed between you and me, I have informed Mr. Dennen, who so understands, that your husband shall pay me for my services on your behalf respecting any settlement.

Kindly let me hear from you respecting this matter."

In response to the foregoing letter Attorney Bates received from plaintiff the following communication, dated January 5, 1939:

"Mr. Alva L. Bates,
Attorney-at-Law,
3458 South State Street
Chicago, Illinois

Dear Sir:

Your letter dated December 28th, 1938 was received and to confirm my conversation with you since receiving the said letter I wish to again state to you that I have not directed you to negotiate a settlement with my husband or anyone else on my behalf; nor have I agreed with you as to what source you shall be paid for any such services.

You were employed as you know to represent me in my case for separate maintenance only. You have informed me that that service has been completed. If in the future I desire your services further I shall get in touch with you.

Very truly yours,

Ruth W. Sewell"

According to Attorney Bates after he received this letter from plaintiff, he ceased negotiations with Attorney Dennen and served notice of his claim for an attorney's lien on the defendant Sewell. Plaintiff testified that she wrote a letter to petitioner on February 5, 1939 formerly discharging him as her attorney; and that "she did not consider any settlement until the last week in April, 1939, after she had employed Mr. Ferguson."

Attorney Bates also testified that when plaintiff retained him to represent her in the separate maintenance proceeding, she also employed him to negotiate a property settlement for her; that "she employed me to negotiate a settlement *** if she did not accept the settlement *** I wasn't supposed to receive any fee *** the fee that I was to get was conditioned upon my negotiating a settlement for her, acceptable to her." Mrs. Sewell denied that she ever employed him to negotiate with her husband for a property settlement.

Plaintiff testified that Attorney Bates called her to his office December 19, 1938 and told her that both he and Louis Dennen, her husband's attorney, thought that she should accept a property settlement of \$7,500 and a divorce; that he also told her that \$7,500 was a good settlement in view of the fact that Sewell had

Mr. J. H. Bates,
Attorney-at-Law,
448 South State Street
Chicago, Illinois

Dear Sir:

Your letter dated December 19, 1938, was received and to confirm my conversation with you in which you stated that you wish to obtain advice from me as to what course of action you should take in negotiating a settlement with your wife, I have not hesitated to do so. I have not hesitated to do so. I have not hesitated to do so.

You were employed by me from December 19, 1938, to January 1, 1939, for separate maintenance only. Your wife informed me that that service has been completed. I am in the future a certain your services further I shall get in touch with you.

Very truly yours,
J. H. Bates

According to Attorney Bates after his receipt of the letter from Plaintiff, he caused negotiations with Plaintiff to be served notice of his claim for an attorney's fees on the defendant. Plaintiff testified that she wrote a letter to defendant on February 2, 1939, informing him of her attorney and that she did not consider any settlement until the last week in

April, 1939, after the last employment of Mr. Bates. Attorney Bates also testified that when Plaintiff called him to report her in the regard the defendant was proceeding, she also employed him to negotiate a property settlement for her; that "she employed me to negotiate a settlement" and that she did not accept the settlement until I was's supposed to receive my fee. The fact that I was to get was conditioned upon my negotiating a settlement for her, according to her. Plaintiff denied that she ever employed him to negotiate with her husband for a property settlement.

Plaintiff testified that Attorney Bates called her to his office December 19, 1938, and told her that both he and Louis Hansen, her husband's attorney, thought that she should accept a property settlement of \$7,500 and a divorce; that he also told her that \$7,500 was a good settlement in view of the fact that Bates had

made assignments amounting to \$150,000 to other parties against his interest in certain Arkansas property; and that Attorney Bates asked her to sign a contract which provided that he was to be paid as his attorney's fee one-third of whatever settlement she received from defendant and that she refused to sign such agreement.

Louis Dennen testified that he was one of Arthur Sewell's attorneys and that on or about January 6, 1939 he received the following letter from plaintiff:

"January 5th, 1939.

"Messrs. Stebbins, McKinley & Price,
33 North LaSalle Street,
Chicago, Illinois

Attention: Mr. Dennen

Gentlemen:

Following^{up} my telephone conversation with Mr. Dennen I wish to again confirm my statement to you that neither Mr. A. L. Bates nor anyone else has any authority to negotiate for or settle any matter between my husband, Arthur Sewell, and myself for or on my behalf.

Very truly yours,

Ruth W. Sewell"

Dennen also testified that a day or two before his receipt of the foregoing letter plaintiff telephone him and said "Mr. Bates is no longer representing me and that you are to have no further negotiations with him;" and that he said to her, "Well, Mrs. Sewell, if that is the situation at the present time I would like to have you write me a letter for my files, so that if Mr. Bates shall call me I can tell him in view of the situation I cannot discuss any more settlement with him."

Attorney Bates presented evidence before the special commissioner in support of his claims for attorney's fees for services alleged to have been rendered by him to Mrs. Sewell in the Superior court as follows:

made assignments amounting to \$150,00 for other persons and his interest in certain business property and that Attorney Bates asked her to sign a contract which provided that she was to be paid as his attorney's fee one-third of whatever settled and she received from defendant and that she refused to sign such agreement.

Doris Berman testified that he was one of Arthur Gowell's attorneys and that on or about January 6, 1939 he received the following letter from Plaintiff:

"January 6th, 1939.

"Messrs. Messers, McKinley & Price,
33 North LaSalle Street,
Chicago, Illinois

Attention: Mr. Berman

Gentlemen:

Following my telephone conversation with Mr. Berman I wish to again confirm my statement to you that neither Mr. A. J. Bates nor anyone else has any authority to negotiate for or settle any matter between my husband, Arthur Gowell, and myself for or on my behalf.

Very truly yours,

Ruth W. Gowell

Berman also testified that a day or two before his receipt of the foregoing letter Plaintiff telephoned him and said "Mr. Bates is no longer representing me and that you are to have no further negotiations with him;" and that he said to her, "Well, Mrs. Gowell, it is that is the situation at the present time I would like to have you write me a letter for my files, so that if Mr. Bates shall call me I can tell him in view of the situation I cannot discuss any more settlement with him."

Attorney Bates presented evidence before the special commissioner in support of his claims for attorney's fees for services alleged to have been rendered by him to Mrs. Gowell in the Superior Court as follows:

22 hours^{out} of Court, in the preparation of
petitions for rules to show cause, at
\$10.00 per hour.....\$ 220.00

25 hours in Court in the prosecution of
the rules to show cause, at \$25.00 per
hour.....\$ 625.00

120 hours for briefing the law on the
facts appertaining to the enforcement
of the decree, at \$10.00 per hour.....\$1,200.00

Fifteen per cent (15%) of the settle-
ment of \$17,500 [\$15,000] made after
the plaintiff engaged Mr. Ferguson.....\$2,250.00

Total fees claimed by Mr. Bates...\$4,295.00"

The special commissioner recommended that the amended peti-
tion of Alva L. Bates in so far as it sought the enforcement of
his purported lien for attorney's fees be dismissed for want of
equity; that petitioner be allowed \$325, the balance admittedly
due him on the \$600 allowed as his attorney's fee under the decree
of separate maintenance; that he be allowed \$75 for services render-
ed in connection with the enforcement of the decree for separate
maintenance instead of \$845 which he claimed for such services
and \$400 for services rendered "in examining the law applicable
to the facts in enforcing the decree for separate maintenance"
instead of \$1,200 which he claimed for said services; and that
petitioner be required to pay plaintiff \$295.65, said amount being
one-half of the costs of the references.

The trial court entered a decree May 20, 1941 which over-
ruled all exceptions to the original report and first and second
supplemental reports of the special commissioner and approved and
adopted said reports in all respects. The decree then directed that
the clerk of the court pay forthwith to plaintiff \$2,033.70, the
balance remaining in his hands of the \$2,500 deposited by Sewell
(this deposit had been reduced by the payment therefrom of special
commissioner and stenographer fees pursuant to orders of the trial
court), and that within two days after her receipt of such money
from said clerk she pay petitioner \$504.35 in full satisfaction

out
 "82 hours of work in the preparation of
 petition for writ of habeas corpus."
 10.00 per hour.....
 82 hours in court in the preparation of
 the writ is a new error, at \$25.00 per
 hour.....
 150 hours for briefing the law on the
 facts appearing to the undersigned
 of the decree, at \$10.00 per hour.....
 Fifteen per cent (15%) of the total
 cost of \$17,000 (\$1,000) less
 the plaintiff engaged Mr. Ferguson.....

Total fees claimed by Mr. Bates, \$1,000.00

The special commissioner recommended that the amount paid-
 tion of Alvin H. Bates in so far as it sought the enforcement of
 his purported lien for attorney's fees be dismissed for want of
 equity; that petitioner be allowed \$325, the balance actually
 due him on the \$600 allowed as his attorney's fee under the decree
 of separate maintenance; that he be allowed \$75 for services rendered
 in connection with the enforcement of the decree for separate
 maintenance instead of \$845 which he claimed for such services
 and \$400 for services rendered "in examining the law applicable
 to the facts in enforcing the decree for separate maintenance"
 instead of \$1,200 which he claimed for said services; and that
 petitioner be required to pay plaintiff and \$150, said amount being
 one-half of the costs of the reference.

The trial court entered a decree May 20, 1941 which over-
 ruled all exceptions to the original report and first and second
 supplemental reports of the special commissioner and approved and
 adopted said reports in all respects. The decree then directed that
 the clerk of the court pay forthwith to plaintiff \$2,000.00, the
 balance remaining in his hands of the \$2,500 deposited by defendant
 (the deposit had been reduced by the payment therefrom of special
 commissioner and stenographer fees pursuant to orders of the trial
 court), and that within two days after her receipt of such money
 from said clerk she pay petitioner \$204.25 as full and satisfaction

of all his claims for attorney's fees arising out of his employment by Ruth Walker Sewell. (The \$504.35 which plaintiff was directed by the decree to pay petitioner represents the difference between \$800, the total amount of attorney's fees allowed him and \$295.65, the share of the costs he was directed to pay her.)

We will first consider petitioner's claims for attorney's fees for services which he testified he rendered to plaintiff in the Superior court in connection with his prosecution of the rules to show cause. As heretofore shown he divided his claims for such services into three classes but for convenience we will hereinafter refer to them as one claim. For these services he claimed before the special commissioner that he was entitled to receive \$2,045. For what? To compel the payment of three months alimony amounting to \$225 and \$150 attorney fees due under the terms of the decree of separate maintenance and for securing by the agreement of March 5, 1938 the payment of temporary alimony at the rate of \$62.50 for eight months which aggregated \$500. Out of the latter amount petitioner received from plaintiff \$125 as an advance on the \$600 attorney's fee allowed under the decree for separate maintenance. It will be remembered that his claim for \$2,045 is for services rendered only in the trial court subsequent to the entry of the decree for separate maintenance on September 30, 1937 and up to and including March 5, 1938. The only legal question that could possibly arise in connection with the prosecution of the rules to show cause in the separate maintenance proceeding was whether defendant's failure to pay the amounts ordered was wilful and the determination of that question depended on whether he had the ability to pay, considering his financial circumstances. The latter question under a comparable factual situation was decided in Reifschneider v. Reifschneider, 144 Ill. App. 119 (affirmed, 241 Ill. 92.) Since Sewell had the financial ability to pay, it necessarily followed that his refusal to pay was wilful. If petitioner ever

of all his claims for attorney's fees arising out of his employment by Ruth Walker Sewell. (The \$504.35 which plaintiff was directed by the decree to pay petitioner represents the difference between \$800, the total amount of attorney's fees allowed him and \$295.65, the share of the costs he was directed to pay her.)

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fees for services which he testified he rendered to plaintiff in the Superior Court in connection with his prosecution of the rules to show cause. As heretofore shown he divided his claims for such services into three classes but for convenience we will hereinafter refer to them as one claim. For these services he claimed before the special commissioner that he was entitled to receive \$2,045. For what? To compel the payment of three months alimony amounting to \$225 and \$150 attorney fees due under the terms of the decree of separate maintenance and for securing by the agreement of March 5, 1938 the payment of temporary alimony at the rate of \$62.50 for eight months which aggregated \$500. Out of the latter amount petitioner received from plaintiff \$125 as an advance on the \$600 attorney's fee allowed under the decree for separate maintenance. It will be remembered that his claim for \$2,045 is for services rendered only in the trial court subsequent to the entry of the decree for separate maintenance on September 30, 1937 and up to and including March 5, 1938. The only legal question that could possibly arise in connection with the prosecution of the rules to show cause in the separate maintenance proceeding was whether defendant's failure to pay the amounts ordered was willful and the determination of that question depended on whether he had the ability to pay, considering his financial circumstances. The latter question under a comparable factual situation was decided in Reischneider v. Reischneider, 144 Ill. App. 119 (affirmed, 341 Ill. 92). Since Sewell had the financial ability to pay, it necessarily followed that his refusal to pay was willful. If petitioner ever

even considered that he was entitled to receive \$2,045 attorney's fees for his services in the trial court in connection with the enforcement of the terms of the separate maintenance decree as to the payment of alimony and solicitor's fees, this item of \$2,045 must have been entirely overlooked by him when he served the notice of attorney's lien on defendant December 30, 1938, since said notice contained no reference to any such claim. This claim for \$2,045 must not have impressed petitioner very seriously when his original petition for attorney's fees was filed in the divorce proceeding, since he made no mention of it therein. If petitioner felt that this was a valid claim, it is difficult to understand why it was mentioned for the first time in the amendment to his petition for attorney's fees, filed in the divorce proceeding on January 10, 1940, which was more than one year and ten months after he rendered the last purported services upon which said claim is based. We think this claim was purely an afterthought. If Attorney Bates felt that there was any merit in this claim for \$2,045, the proper place for it to have been made was in the separate maintenance proceeding, and there it could only have been made by plaintiff. It must be borne in mind that when plaintiff employed petitioner to represent her in the separate maintenance proceeding it was agreed that he would have to look to defendant for whatever fees he was entitled to receive and it is conceded that plaintiff did not obligate herself personally to pay petitioner for any services rendered by him in her behalf.

Petitioner makes the following statement in his reply brief: "It may be admitted that, over the objection of plaintiff, the court below could not in this [divorce] proceeding have decided the question of plaintiff's liability on those claims and rendered judgment against her personally. But plaintiff voluntarily submitted herself to the jurisdiction of the court in the proceeding to enforce the lien claimed by petitioner by obtaining leave of court to answer the petition filed by petitioner ***, which said petition was directed against the defendant, and by obtaining leave to have her answer to

even considered that he was entitled to receive \$2,042 attorney's fees for his services in the trial court in connection with the enforcement of the terms of the separate maintenance decree as to the payment of alimony and solicitor's fees, this item of \$2,042 must have been entirely overlooked by him when he served the notice of attorney's lien on defendant December 30, 1938, since said notice contained no reference to any such claim. This claim for \$2,042 must not have impressed petitioner very seriously when his original petition for attorney's fees was filed in the divorce proceeding, since he made no mention of it therein. If petitioner felt that this was a valid claim, it is difficult to understand why it was mentioned for the first time in the amendment to his petition for attorney's fees, filed in the divorce proceeding on January 10, 1940, which was more than one year and ten months after he rendered the last purported services upon which said claim is based. We think this claim was purely an afterthought. If Attorney Bates felt that there was any merit in this claim for \$2,042, the proper place for it to have been made was in the separate maintenance proceeding, and there it could only have been made by plaintiff. It must be borne in mind that when plaintiff employed petitioner to represent her in the separate maintenance proceeding it was agreed that he would have to look to defendant for any services rendered by him in her behalf.

Petitioner makes the following statement in his reply brief: "It may be admitted that, over the objection of plaintiff, the court below could not in this [divorce] proceeding have decided the question of plaintiff's liability on those claims and rendered judgment against her personally. But plaintiff voluntarily submitted herself to the jurisdiction of the court in the proceeding to enforce the lien claimed by petitioner by obtaining leave of court to answer the petition filed by petitioner *** which said petition was directed against the defendant, and by obtaining leave to have her answer to

said petition stand as her answer to said petition as amended
***. And said petition as amended sets out claims ex contractu
against plaintiff."

While it is true that Attorney Bates' original petition filed in the divorce proceeding was directed primarily against the defendant to enforce petitioner's alleged right to an attorney's lien against Sewell, it contained the allegation that "there is now due and owing from Mrs. Sewell a reasonable sum as compensation for services rendered in the negotiations respecting a property settlement between Mr. and Mrs. Sewell." This allegation called for an answer by plaintiff and as will be hereinafter shown she waived none of her rights by filing same.

There are no allegations "ex contractu" to the effect that plaintiff was obligated to pay Attorney Bates fees for his services in the separate maintenance proceeding, either in his petition or in the amendment thereto, and if there were, they would have been untrue, in view of his admission upon the hearing before the special commissioner that the only attorney's fees he was entitled to receive from plaintiff in the separate maintenance proceeding were such as she was able to procure for him from defendant. It was only in the separate maintenance proceeding that the court had the power or authority to compel Sewell to pay for legal services rendered to plaintiff by her attorney in that proceeding. It will be noted that petitioner did not seek in the divorce proceeding to enforce as against Sewell his claim for his alleged services to plaintiff in the separate maintenance proceeding. It is a fair assumption that he knew that the court lacked jurisdiction in the divorce proceeding to pass upon any such claim made by him against Sewell. We are at a loss to understand how the court in the divorce proceeding could possibly have jurisdiction to adjudicate petitioner's alleged claim against Mrs. Sewell for attorney's fees arising out of the separate maintenance proceeding, when even in

and the court held that the plaintiff's claim for damages was barred by the statute of limitations.

The court also held that the plaintiff's claim for interest was barred by the statute of limitations.

The court further held that the plaintiff's claim for costs was barred by the statute of limitations. The court also held that the plaintiff's claim for attorney's fees was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of consortium was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of society was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of companionship was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of consortium was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of society was barred by the statute of limitations. The court also held that the plaintiff's claim for damages for loss of companionship was barred by the statute of limitations.

There are no allegations "ex contractu" in the complaint that the defendant was obligated to pay attorney's fees for his services in the separate maintenance proceeding, either in his petition or in the amendment thereto, and if there were, they would have been waived, in view of his admission in the pleading before the special commissioner that the only attorney's fees he was entitled to receive from plaintiff in the separate maintenance proceeding were such as she was able to pay him from her own funds. It was only in the separate maintenance proceeding that the defendant had the power or authority to compel plaintiff to pay for legal services rendered to plaintiff by her attorney in that proceeding. It will be noted that plaintiff did not seek in the above proceeding to enforce an agreement between his claim for his alleged services to plaintiff in the separate maintenance proceeding. If the claim is upheld, that he knew that the court would grant judgment in the divorce proceeding to pass upon any claim of his made by him against herself. We are at a loss to understand how the court in the divorce proceeding could possibly have jurisdiction to adjudicate plaintiff's alleged claim against Mrs. Howell for attorney's fees arising out of the separate maintenance proceeding, when even in

the latter proceeding the court would be without power to consider such claim against her. Petitioner also states in his reply brief "that a woman who employs an attorney to represent her, even in a divorce proceeding, is liable to him for his fees is elementary law." Petitioner must agree that it is also elementary law that where, as here, plaintiff employed petitioner to represent her in the separate maintenance proceeding with the express understanding that the only attorney's fees he was entitled to receive therein were such as plaintiff was able to procure for him from defendant, she was not personally liable for any legal services rendered by him in said proceeding.

As heretofore shown petitioner admits that the trial court was without jurisdiction in the divorce proceeding to decide "the question of plaintiff's liability on those claims or render judgment against her personally." But he states that "plaintiff voluntarily submitted herself to the jurisdiction of the court by filing her answer by leave of court to his petition and have said answer stand to this petition as amended." Assuming that the court in the divorce proceeding thus acquired jurisdiction of plaintiff's person, did it have jurisdiction of the subject matter of the claim of petitioner under consideration? From what we have already said we think it sufficiently appears that the trial court did not. A universally recognized rule is that solicitor's fees in a divorce or separate maintenance proceeding belong to the wife and must be paid to her, and that her attorney may not file a petition in his own behalf for such fees. Notwithstanding this rule and notwithstanding petitioner's utter failure to make any attempt to enforce, through plaintiff in the separate maintenance proceeding, payment by Sewell of fees for the legal services now claimed to have been rendered therein by said petitioner to the extent of \$2,045, his contention that he had the right to proceed directly against plaintiff in the divorce proceeding to enforce payment of such fees by her is entirely lacking in merit. Petitioner even goes so far as to argue that "the

the latter proceeding the court would be without power to take
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 behalf for such fees. Notwithstanding this rule and notwithstanding
 petitioner's utter failure to make any attempt to enforce, through
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 of fees for the legal services now claimed to have been rendered
 therein by said petitioner to the extent of \$2,045, his contention
 that he had the right to proceed directly against plaintiff in the
 divorce proceeding to enforce payment of such fees by her is entirely
 lacking in merit. Petitioner even goes so far as to suggest that "the

liability of plaintiff to petitioner for fees for services rendered by petitioner to plaintiff in enforcing the decree of separate maintenance was a contractual debt arising from the implied promise of plaintiff to pay for such services." This argument is made in spite of the fact that he admitted upon the hearing before the special commissioner and he admits here that his employment by plaintiff as her attorney in the separate maintenance proceeding was with the express understanding that his fees for his services therein were to be paid solely by defendant Sewell.

We are impelled to hold that petitioner had no valid claim against plaintiff for the services alleged to have been rendered by him in the separate maintenance proceeding subsequent to the entry of the decree therein; that he had no right to proceed against plaintiff in the divorce proceeding for the purpose of enforcing the payment of said purported claim; that the court in the divorce proceeding had no jurisdiction to pass upon a claim that could only have been determined in the separate maintenance proceeding and even in that proceeding, only if it were made by plaintiff, Ruth Walker Sewell, against defendant, Arthur Sewell; and that the trial court erred in decreeing that plaintiff pay petitioner the sums of \$75 and \$400 for legal services claimed to have been rendered by him in the separate maintenance proceeding subsequent to the entry of the decree therein.

We turn now to petitioner's contention that "the decree should be reversed in so far as the court refused to award petitioner any attorney's fees demanded pursuant to the contract of employment of the petitioner by the plaintiff to negotiate a property settlement for her." Plaintiff insisted in the trial court and insists here that she never at any time employed or authorized petitioner to negotiate in her behalf for a property settlement with her husband and that she never promised to pay

liability of plaintiff to petitioner for fees for services rendered by petitioner to plaintiff in enforcing the decree of separate maintenance was a contractual debt arising from the implied promise of plaintiff to pay for such services." This argument is made in spite of the fact that it is stated upon the hearing before the special commissioner and he holds here that his employment by plaintiff as her attorney in the separate maintenance proceeding was with the express understanding that his fees for his services therein were to be paid solely by defendant Jewell.

We are impelled to hold that petitioner had no valid claim against plaintiff for the services alleged to have been rendered by him in the separate maintenance proceeding subsequent to the entry of the decree therein; that he had no right to proceed against plaintiff in the divorce proceeding for the purpose of enforcing the payment of said purported claim; that the court in the divorce proceeding had no jurisdiction to pass upon a claim that could only have been determined in the separate maintenance proceeding and even in that proceeding, only if it were made by plaintiff, Ruth Walker Jewell, against defendant,

Arthur Jewell; and that the trial court erred in decreeing that plaintiff pay petitioner the sum of \$75 and \$400 for legal services claimed to have been rendered by him in the separate maintenance proceeding subsequent to the entry of the decree therein. We turn now to petitioner's contention that "the decree

should be reversed in so far as the court refused to award petitioner any attorney's fees demanded pursuant to the contract of employment of the petitioner by the plaintiff to negotiate a property settlement for her." Plaintiff insists in the trial court and insists here that she never at any time employed or authorized petitioner to negotiate in her behalf for a property settlement with her husband and that she never promised to pay

him any fee for negotiating such a settlement.

Petitioner maintains that plaintiff employed him in May, 1937 under an oral contract not only to represent her in the separate maintenance proceeding but also to negotiate a property settlement for her. Petitioner states that no definite fees were fixed for his services but that it was contemplated under the contract that he was to receive reasonable compensation for such services as he rendered to plaintiff. He also states that it was agreed between himself and plaintiff that she would be under no personal obligation to pay him for any services rendered by him in her behalf, that he would have to procure from defendant such fees as he was entitled to receive and that he was not entitled to receive a fee for any services performed by him in attempting to negotiate a settlement of plaintiff's property rights unless he presented a proposal of settlement that was acceptable to her. This is the contract upon which petitioner predicates his right to recover reasonable compensation - \$2,250 - for his services in connection with his unsuccessful negotiations for a property settlement.

While Attorney Bates' admitted attempt to induce plaintiff to sign a written contract about December 20, 1938, authorizing him to negotiate a property settlement that would net her at least \$10,000 in cash and obligate her personally to pay him attorney's fees if the amount of the settlement exceeded \$10,000, as well as other evidence in the record, casts serious doubt on petitioner's claim that plaintiff employed him under an oral contract in May 1937 to negotiate a property settlement for her, it will be assumed for the purposes of this appeal that petitioner and plaintiff did enter into said oral contract. As to petitioner's performance of his obligations under the oral contract in respect

him any fee for negotiating such a settlement.

Petitioner maintains that Plaintiff employed her in May,

1937 under an oral contract not only to represent her in this

separate maintenance proceeding but also to negotiate a property

settlement for her. Petitioner states that no definite fees

were fixed for her services but that it was contemplated under

the contract that he was to receive reasonable compensation for

such services as he rendered to Plaintiff. He also states that

it was agreed between himself and Plaintiff that she would be

under no personal obligation to pay him for any services rendered by

him in her behalf, that he would have to procure from Plaintiff such

fees as he was entitled to receive and that he was not entitled to

receive a fee for any services performed by him in attempting to

negotiate a settlement of Plaintiff's property rights unless he

presented a proposal of settlement that was acceptable to her.

This is the contract upon which petitioner practices his right to

recover reasonable compensation -- \$2,500 -- for his services in

connection with his unsuccessful negotiations for a property

settlement.

While Attorney Bates' admitted attempt to induce Plaintiff

to sign a written contract about December 30, 1938, emphasizing

him to negotiate a property settlement that would not bar at least

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as other evidence in the record, casts serious doubt on Peti-

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in May 1937 to negotiate a property settlement for her. It will

be assumed for the purposes of this appeal that petitioner and

Plaintiff did enter into said oral contract. As to petitioner's

performance of his obligations under the oral contract in respect

to negotiating a property settlement the special commissioner made the following finding, which was incorporated in the decree:

"While the plaintiff denies that she authorized him to negotiate a settlement, the testimony of the petitioner was that he was not supposed to receive any fee, if the plaintiff did not accept the settlement, and she did not accept the settlement negotiated by the petitioner."

Petitioner's only proposal of settlement was made to plaintiff about December 27 or December 28, 1938, when, according to him, he submitted a proposition that she accept in settlement of her property rights certain improved property and \$1,200 in cash and she refused to accept same. As already shown, Attorney Bates testified that one of the terms of the contract of May 1937 was that he was not entitled to attorney's fees unless he produced a proposal of settlement of plaintiff's property rights that was acceptable to her. He did not do so and therefore there was no performance of the contract on his part that entitled him to recover any fees for services rendered by him in connection with his negotiations for such a settlement. But petitioner asserts that he was not given a reasonable time within which to carry on such negotiations. He had from May 1937 to and including December, 1938, in which to negotiate a settlement that was acceptable to plaintiff. In our opinion the 19 months indicated was a reasonable time and, not having successfully negotiated a settlement within said period, plaintiff was justified in dispensing with the services of petitioner when she did.

Petitioner's claim for the \$325 heretofore referred to was not in dispute and, holding as we do that petitioner is not entitled to recover from plaintiff any of the other fees claimed by him, it is unnecessary to discuss the applicability of the attorney's lien act. We have considered the other points urged and the authorities cited in support thereof but in the view we take of this case we deem further discussion unnecessary since it would only serve to further lengthen this already long opinion.

For the reasons stated herein that portion of the decree

to negotiating a property settlement, the special commission made the following finding, which was incorporated in the report: "While the plaintiff denies that she authorized him to negotiate a settlement, the testimony of the plaintiff was that he was not supposed to receive any fee, if the plaintiff did not accept the settlement, and she did not accept the settlement negotiated by the petitioner."

Petitioner's only proposal of settlement was made to plaintiff about December 27 or December 28, 1938, when, according to him, he submitted a proposition that she accept in settlement of her property rights certain improved property and \$1,500 in cash and she refused to accept same. As already shown, plaintiff testified that one of the terms of the contract of May 1937 was that he was not entitled to an attorney's fees unless he procured a proposal of settlement of plaintiff's property rights that was acceptable to her. He did not do so and therefore there was no performance of the contract on his part that entitled him to recover any fees for services rendered by him in connection with his negotiations for such a settlement. The petitioner asserts that he was not given a reasonable time within which to carry on such negotiations. He had from May 1937 to the inclusion of Plaintiff, in which to negotiate a settlement that was acceptable to plaintiff. In our opinion the 19 months involved was a reasonable time and, not having successfully negotiated a settlement within said period, plaintiff was justified in disavowing both the services of petitioner when she did.

Petitioner's claim for the \$325 heretofore referred to was not in dispute and, holding as we do that petitioner is not entitled to recover from plaintiff any of the other fees claimed by him, it is unnecessary to discuss the applicability of the attorney's lien act. We have considered the other points urged and the authorities cited in support thereof but in the view we take of this case we deem further discussion unnecessary since it would only serve to further lengthen this already long opinion.

For the reasons stated herein that portion of the decree

of the Superior court of Cook county which disallowed petitioner's claim for fees in connection with his negotiations for a property settlement as well as that portion thereof awarding him fees in the amount of \$325 admittedly due him, are affirmed, and those portions of the decree, which awarded petitioner \$75 and \$400 as attorney's fees and ordered him to pay one-half of the costs of the references, are reversed and the cause is remanded with directions to disallow all of petitioner's claims against plaintiff for attorney's fees except his claim for \$325, the balance due on the \$600 attorney's fee allowed by the decree of separate maintenance, which she admittedly owed him, and that he be ordered to pay all the costs of the references to the special commissioner.

AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED WITH DIRECTIONS.

Friend and Scanlan, JJ., concur.

42030

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ROBERT DeSALVIA,
Appellee,

v.

JOSEPH P. GEARY, WENDELL E. GREEN,
and JOHN E. BRENNAN, Civil Service
Commissioners of the City of
Chicago, and EDWARD J. DENEMARK,
Superintendent of the House of
Correction of the City of Chicago,
Appellants.

319 I.A. 641

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a mandamus action instituted by relator, Robert DeSalvia (hereinafter for convenience referred to as plaintiff) to compel his restoration by the Civil Service Commission of the City of Chicago to the position formerly held by him in the classified service of said city as guard at the House of Correction and to expunge from the record of the Civil Service Commission its finding that plaintiff was guilty of the charges made against him and also the order removing him from the service.

The respondents named in plaintiff's petition for mandamus are the Superintendent of the House of Correction of the City of Chicago and the members of the Civil Service Commission and they will be hereinafter referred to as defendants. Defendants' motion to strike plaintiff's petition for mandamus was denied and they filed a joint and several answer, which set up the entire proceedings before the commission. The trial court sustained plaintiff's motion to strike defendants' answer and entered judgment directing the issuance of a writ of mandamus commanding defendants to restore plaintiff to his position and to do all acts requisite to place him on the roster and payroll of the City of Chicago. Defendants appeal from the judgment.

The Civil Service Commission found that plaintiff, who was a tower guard, failed to observe numerous rules and regulations of the House of Correction which were promulgated to prevent the escape

PEOPLE OF THE STATE OF ILLINOIS
 ex rel. ROBERT DESALVIA,
 Appellee,

v.

JOSEPH P. JERRY, WENDALL E. JERRY,
 and JOHN A. CHRYSLER, Civil Service
 Commissioners of the City of
 Chicago, and EDWARD J. DUNN, JR.,
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 Appellants.

COURT OF CIVIL JUSTICE, CHICAGO

OUR HONORABLE

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 City of Chicago to the position formerly held by him in the class-

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to expunge from the record of the Civil Service Commission its

finding that plaintiff was guilty of the charges made against him

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The Civil Service Commission found that plaintiff, who was

a tower guard, failed to observe numerous rules and regulations of

the House of Correction which were promulgated to prevent the escape

of prisoners incarcerated therein and that by reason of his failure to observe such rules and regulations he permitted two prisoners to attack him and escape from said institution.

Plaintiff's petition raises no question as to the sufficiency of the notice of his hearing before the commission or the opportunity that was given him to introduce evidence.

The charges filed against him before the Civil Service Commission were as follows:

"CHARGES

Conduct unbecoming an employee of the City of Chicago.
Disobedience of orders.
Inattention to duty.
Neglect of duty.

SPECIFICATIONS.

It is charged that Robert DeSalvia in the employ of the City of Chicago and assigned to the House of Correction, did upon April 11th, 1940 disobey the orders of his Superior officers.

It is further charged that the said Robert DeSalvia was on April 11, 1940 inattentive to duty.

It is further charged that the said Robert DeSalvia did upon April 11, 1940 neglect his duty."

Relator's petition alleged inter alia:

"Plaintiff further respectfully represents that at the beginning of said hearing his counsel, Michael F. Ryan, filed said motion to quash, objecting to the generality of said charges and the fact that they did not comply with the provisions of Section 1 of Rule VI of the Rules of the Civil Service Commission of the City of Chicago as hereinabove set forth; that said Commission denied said motion of plaintiff to quash said charges, whereupon plaintiff, through his counsel, made a motion for a bill of particulars asking for a statement of the facts allegedly constituting the basis for the charges filed against him pursuant to Section 1 of Rule VI of the Rules of the Civil Service Commission hereinabove set forth; that said Commission denied the motion of plaintiff for a bill of particulars, and in so doing ignored its own rule in said

of prisoners incarcerated therein and that by reason of his failure to observe such rules and regulations he permitted two prisoners to attack him and escape from said institution. Plaintiff's petition raises no question as to the ability of the notice of his hearing before the Commission or the opportunity that was given him to introduce evidence. The charges filed against him before the Civil Service Commission were as follows:

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regard, and denied plaintiff herein an opportunity to be heard in his own defense in compliance with the provisions of Section 12 of 'An Act to Regulate the Civil Service of Cities, and therefore, said order of discharge was void."

Defendants' motion to strike the petition for mandamus contained the following among other allegations:

"Mandamus is the wrong remedy herein as there was no ministerial duty involved in the discharge of plaintiff, said action of the Civil Service Commission involving discretion and judgment, and there being no abuse of discretion shown in the petition, the action should be for certiorari.

"Mandamus cannot lie in this case where, from the allegations of the petition, it is clear that the defendants have not violated any duty incumbent upon them to perform and it is equally clear that it is not their duty to do that which the petition seeks."

Defendants' principal contention is that "mandamus does not lie to review the proceedings of the Civil Service Commission" and that "the petition for mandamus should therefore have been dismissed on the ground that it does not state a cause of action."

Plaintiff's theory as stated in his brief is that "under the provisions of Section 12 of the City Civil Service Act, no Civil Service employee can be discharged except, among other things, for cause, and except upon written charges specifically setting forth the facts alleged to constitute just cause; that the Civil Service Commission is bound by its own rules requiring the charges to state specifically the facts alleged to constitute cause for removal; that the Civil Service Commission must set forth all facts necessary to justify its action in removing an employee; that in the case at bar the Civil Service Commission violated its own rules and failed to set forth the necessary facts to warrant the removal order, and was, therefore, without jurisdiction to order plaintiff's discharge."

In other words plaintiff insists that the failure of the commission to order the filing of a bill of particulars stating

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In other words plaintiff insists that the failure of the commission to order the filing of a bill of particulars stating

specifically the charges against him in response to his motion in that regard violated both the City Civil Service Act and the Rules of the commission itself; that it was therefore without jurisdiction to order plaintiff discharged; and that mandamus is a proper remedy to secure reinstatement of a Civil Service employee wrongfully removed.

These identical questions were considered by the Supreme court in the recent case of The People v. Allman, 382 Ill. 156 (Advance Sheets No. 2) and determined adversely to plaintiff's contentions here. There three separate cases involving the discharge of patrolmen by order of the Civil Service Commission of the City of Chicago, in which writs of mandamus were ordered to issue by the trial court commanding their restoration to their positions, were consolidated in the Supreme Court for "oral argument and opinion." In that case it was said at pages, 158, 159, 160, 161, 162, 163, 164, 165, 166 and 167:

"These are mandamus actions instituted in the Circuit court of Cook county by petitioners who had formerly been patrolmen under the classified civil service of the department of police of the city of Chicago but whose names had been stricken from such list by order of the Civil Service Commission of the city. The prayers of the three petitions were the same, in that each asked that the relator be restored to his position as patrolman in the classified service of the department of police, that he be assigned to duties as a patrolman, that his name be placed on the roster and payroll of the department and that he be paid for past as well as future services. The prayer also included the request to expunge all orders of the commission and of the commissioner of police pertaining to the removal of the petitioners from the classified service. ***

"Defendants challenged the sufficiency of the petitions by a motion to strike, which was overruled. One of the grounds alleged in support of the motion was that the petition did not show the violation of a duty which defendants owed plaintiffs and that the relief prayed could not be granted in a mandamus proceeding. The joint and several answers set up the entire proceeding before the commission as it related to the respective plaintiffs. ***

"Judgments were entered in favor of the respective plaintiffs and each recited that defendants' answer was insufficient in law to constitute a defense. The writ which was issued in each case commanded defendants to restore each plaintiff to his former position as a patrolman, to assign him duties as such and directed that he be paid his regular pay. ***

"The first matter for consideration is as to whether the relief sought is obtainable in a mandamus action. ***

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"The first matter for consideration is as to whether the relief sought is obtainable in a mandamus action. ***

"Defendants contend that the relief sought cannot be granted in a mandamus proceeding and that since the Civil Service Act provides no method for review of hearings held before the commission, the only remedy plaintiffs have is a review by the common-law writ of certiorari. That an interested party who is aggrieved by the ruling of an administrative body has a right to have the proceeding reviewed by use of the common-law writ of certiorari is firmly established by the opinions of this court but it is not necessary in these cases to detail the circumstances under which the writ may be employed or the limitations that encompass its use. It is sufficient to say that there is a well-defined distinction between the relief granted in the two actions. In common-law certiorari the writ of a superior tribunal issues to review an official or judicial act while in a mandamus action the writ issues to compel action. (38 C. J., p. 545, sec. 11.) A mandamus proceeding can not be made to perform the office of a writ of error or of certiorari or an appeal. People ex rel. Carlstrom v. Shurtleff, 355 Ill. 210; People ex rel. Kennon v. LaBuy, 305 id. 11.

"The city of Chicago is operating under an act entitled 'An Act to regulate the Civil Service of cities.' (Ill. Rev. Stat. 1941, chap. 24-1/2 pars. 39-77, sec. 1 et seq.) The civil service list to which plaintiffs seek reinstatement is the one provided by that act and the hearings of the commission set up in defendants' answer to the petition for mandamus were held pursuant to the authority of section 12 (par. 51) of that act. The parts of the section insofar as material here are that the employee whose name is on the classified list shall not have his name removed from such list 'except for cause, upon written charges and after an opportunity to be heard in his own defense.'

"Plaintiffs raise no question as to the sufficiency of the notices of the hearing before the commission or the opportunity that was given them to introduce evidence. The objections they make to the proceedings before the commission and upon which they base their right to have a writ of mandamus issued are somewhat different in the respective cases and for a proper consideration of the issues a summary of each must be set forth.

"In No. 26794, plaintiff Charles E. Elmore alleged that the commission had adopted certain rules in reference to the procedure to be followed in hearings for removal of names from the classified service, one of which rules provided that all charges filed with the commission 'should state specifically the facts alleged to constitute the cause for discharge.' ***

"The allegations in No. 26886, John F. Sweeney, plaintiff, were, except as to the charges and specifications, the same as contained in the Elmore petition. The charges against Sweeney were conduct unbecoming a police officer, neglect of duty and inattention to duty. The specifications were as general in their terms as the offenses stated in the charges. It is alleged that Sweeney's attorney objected to the generality of the charges and asked that they be made more specific, which request was overruled. It is further alleged that the only testimony heard by the commission was in reference to Sweeney's performance of his duties on April 8, 1940, at which time he was assigned to the special duty of guarding a certain store. He alleges that while he was on duty in the store, two men entered and by force of arms took his revolver from him and locked him and a clerk of the store in a washroom and then robbed the store. The facts surrounding the robbery are set forth in detail in excuse of plaintiff's failure to overcome the robbers but since we are of the opinion that the

"Defendants contend that the writ of certiorari cannot be granted in a mandamus proceeding and that since the Civil Service Act provides no method for review of hearings held before the commission, the only remedy plaintiffs have is a review by the common-law writ of certiorari. That an interested party has a right of review by the writ of an administrative body has a right to have the proceeding reviewed by use of the common-law writ of certiorari is firmly established by the opinions of this court but it is not necessary in these cases to detail the circumstances under which the writ may be employed or the limitations that encompass its use. It is sufficient to say that there is a well-defined distinction between the relief granted in the two actions. In common-law certiorari the writ of a superior tribunal issues to review an official or judicial act while in a mandamus action the writ issues to compel action. (38 C. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

"The city of Chicago is operating under an act entitled 'An Act to regulate the Civil Service of cities', (Ill. Rev. Stat. 1941, chap. 24-1/2, sec. 1 et seq.). The civil service list to which plaintiffs seek reinstatement is the one provided by that act and the hearings of the commission set up in defendants' answer to the petition for mandamus were held pursuant to the authority of section 12 (par. 1) of that act. The parts of the section insofar as material here are that the employee whose name is on the classified list shall not have his name removed from such list except for cause, upon written charges and after an opportunity to be heard in his own defense.

"Plaintiffs raise no question as to the sufficiency of the notices of the hearing before the commission or the opportunity that was given them to introduce evidence. The objections they make to the proceedings before the commission and upon which they base their right to have a writ of mandamus issued are somewhat different in the respective cases and for a proper consideration of the issues a summary of each must be set forth.

"In No. 2674, plaintiff Charles W. Elmore alleged that the commission had adopted certain rules in reference to the procedure to be followed in hearings for removal of names from the classified service, one of which rules provided that all charges filed with the commission should state specifically the facts alleged to constitute the cause for discharge. ***

"The allegations in No. 26886, John T. Gweeney, claimant, were, except as to the charges and specifications, the same as contained in the Elmore petition. The charges against Gweeney were conduct unbecoming a police officer, neglect of duty and inattention to duty. The specifications were as general in their terms as the offenses stated in the charges. It is alleged that Gweeney's attorney objected to the generality of the charges and asked that they be made more specific, which request was overruled. It is further alleged that the only testimony heard by the commission was in reference to Gweeney's performance of his duties on April 8, 1940, at which time he was assigned to the special duty of guarding a certain store. He alleges that while he was on duty in the store, two men entered and by force of arms took his revolver from him and locked him and a clerk of the store in a washroom and then robbed the store. The facts surrounding the robbery are set forth in detail in excuse of plaintiff's failure to overcome the robbers but since we are of the opinion that the

questions raised on the evidence are not reviewable in a mandamus action, it will not be necessary to set them forth at greater length. The answer of defendants, as in the Elmore case, set forth the entire proceeding before the commission and its findings of fact based on the evidence.

"The allegations in No. 26929, Aubrey G. O'Kelley, plaintiff, are in the main the same as in the preceding cases. The charges preferred against him are conduct unbecoming a police officer, neglect of duty, incapacity or inefficiency in the service and the making of a false official report. The specifications are in general terms and do not give any more information as to the facts than the charges. The other allegations upon which the writ of mandamus was asked are, for purposes here, to be considered as being the same as those in the Elmore and Sweeney cases. ***

"Before a mandamus writ may issue it must clearly appear that the petitioner has a clear right to the relief he seeks. (Scott v. City of Chicago, 205 Ill. 281; Swift v. Klein, 163 id. 269.) If the administrative body or inferior tribunal has acted without power, then mandamus is the proper remedy to expunge the void orders from its record. (People v. Shurtleff, supra; People v. LaBuy, supra; People ex rel. Waver v. Wells, 255 Ill. 450.) It is not a writ of right. (People ex rel. Beardsley v. City of Rock Island, 215 Ill. 488; People ex rel. Akin v. Board of Supervisors, 185 id. 288.) Admittedly, mandamus does not lie to control or review the discretion of an inferior tribunal (People ex rel. Brachear v. Board of Supervisors, 308 Ill. 543; People ex rel. Thatcher v. Village of Hyde Park, 117 id. 462,) and in mandamus actions against administrative officers, such as the commission in this case, the courts will not inquire into the merits of the matter that it may substitute its own judgment or discretion for that of the administrative body. (People ex rel. Miller v. City of Chicago, 234 Ill. 416.) In this latter case it was said: 'Where acts and duties necessarily call for the exercise of judgment and discretion on the part of an officer, body or person at whose hands performance is required, mandamus will not lie to direct how such discretion shall be exercised.'

"It is true that an action in mandamus may, under certain circumstances, provide a remedy against a clear abuse of discretion. However, its application is restricted to directing that action be taken and it is never available to direct what action shall be taken. In People ex rel. Schweder v. Brady, 268 Ill. 192, it was said: 'He may not arbitrarily withhold the certificate, alleging such a reason where it does not, in fact, exist. Such a withholding would be an act of the will, only, and not of the judgment, and would be such a palpable abuse of discretion as could be controlled by mandamus.'

"In the case of People ex rel. Green v. Comrs. of Cook County, 176 Ill. 576, the court was asked to issue a writ to compel the Board of Commissioners of Cook county to act as a county board of review to review assessments on certain property. It was held that although the board had taken action it was such a gross abuse of discretion and such an evasion of a positive duty as to amount to a virtual refusal to perform the duty enjoined upon it by the statute and, in effect, in law it was the same as though no action had been taken, and a mandamus writ was awarded. See also, People ex rel. Jones v. Webb, 256 Ill. 364; State Board of Equalization v. People ex rel. Goggin, 191 id. 528.

"Plaintiffs refer to the order of the commission entered

in the Sweeney and O'Kelley cases overruling their motion for a more specific statement of the charges preferred against them. They argue that such order was a violation of the commission's own rules which required that the charges state the facts upon which it was passing and that a correct order is within the scope of relief that may be granted in a mandamus proceeding. It is obvious the writ could not issue to compel the commission to act, for it had ruled on the motion. Any other command to the commission which required action on its part would necessarily involve a direction as to the ruling it should make on the motion.

"It is contended that the ruling made on the motion was an unreasonable and arbitrary act. It is not charged the commission acted capriciously or that its action was of fraudulent design. There is nothing in any of the hearings held by the commission that impeaches its fairness or its purpose to grant plaintiffs a full and fair hearing. The overruling of the motion does not bring the case within that class where the action taken was such an evasion of duty as to amount in law to a refusal to perform a duty. At most the ruling on the motion was an error of judgment which can not be corrected in an action of mandamus.

"The courts cannot, in a mandamus proceeding, invade the field which the statute has placed under the jurisdiction of the commission. The power to hear evidence and determine whether there has been a violation of rules is vested in the commission and it is not within the power of a court in a mandamus proceeding to review the evidence, and adjudge whether a writ of mandamus should issue to compel the commission to enter orders to meet the court's interpretation of the rules and evidence. The relief prayed for in each of these cases was not within the scope of relief that may be granted in a mandamus action.

"There are cases where this court has recognized that a mandamus writ may properly be used where the acts of an administrative commission were questioned. A brief analysis of some of them will illustrate the limitations of the court's inquiry in a mandamus proceeding. In Stott v. City of Chicago, *supra*, petitioner, who was on the classified list and whose name had been dropped from such list, asked for a writ directed to the commission commanding his reinstatement. He alleged that no charges were preferred against him, no trial had and other irregularities were stated. Respondents' plea set up that petitioner was discharged for inefficiency and because there was insufficient appropriation to pay salaries of police patrolmen and that, therefore, it was necessary to discharge some of them, which included petitioner. The writ was denied and the basis of the holding was that petitioner had not alleged facts to show a clear legal right to the relief prayed and that inasmuch as his alleged claim was predicated upon a right to an office and compensation, it was essential that he show he was an officer *de jure* as well as *de facto*. To the same effect is McNeill v. City of Chicago, 212 Ill. 481.

"In Fitzsimmons v. O'Neill, 214 Ill. 494, petitioner alleged he had been discharged without opportunity for a hearing under section 12 of the Civil Service Act. On the issues made by the pleadings, the court found that he was discharged from the classified list by reason of insufficient funds to pay and that he was not entitled to a hearing under section 12. It was said that a hearing under section 12 referred to cases where an officer or employee was removed for some reason personal to himself. (City of Chicago v. People ex rel. Gray, 210 Ill. 84.) A hearing before the commission resulted in an order of discharge. A mandamus writ was awarded for the reason that the rules of the commission provided that the trial board should consist of at least one representative of the commission. It was found that this

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"It is contended that the ruling made on this motion was not unreasonable and arbitrary. It is not charged the Commissioner acted capriciously or that the action was of manifest injustice. There is nothing in any of the grounds held by the Commissioner that impugns the fairness or the purpose to grant reinstatement. The overturning of the motion does not bring the case within that class where the action taken was such an invasion of duty as to amount in law to a refusal to perform a duty. At most the ruling on the motion was an error of judgment which can not be corrected on this motion."

"The court cannot, in a mandamus proceeding, invade the field which the statute has placed under the jurisdiction of the commission. The power to hear evidence and determine whether there has been a violation of rules is vested in the commission and it is not within the power of a court in a mandamus proceeding to review the evidence, and adjudge whether a writ of mandamus should issue to compel the commission to enter orders to deny the court's interpretation of the rules and evidence. The relief prayed for in each of these cases was not within the scope of relief that may be granted in a mandamus action.

He showed he was an officer de jure as well as de facto. To the same effect as McNeill v. City of Chicago, 213 Ill. 431. The writ was denied and that inasmuch as his alleged claim was predicated thereon had not alleged facts to show a colorable right to the writ was denied and the basis of the holding was that petitioner was denied some of them, which involved decisions necessary to discharge some of them. Therefore, it was for inefficiency and because there was fraudulent procurement stated. Respondent's plea set up that petitioner was discharged preferred against him, no trial had and other local authorities were commanding his reinstatement. He alleged that no charges were from such list, asked for a writ directed to the commission. He was on the classified list and those names had been dropped mandamus proceeding. In Scott v. City of Chicago, 213 Ill. 431, petition will illustrate the limitations of the court's authority in a five commission were questioned. A brief analysis of some of them mandamus writ may properly be used where the case of an administrative officer is raised. There are cases where this court has recognized that a

IN Washington v. Glucksberg, 530 U.S. 428 (2000), the Court held that the Due Process Clause of the Fifth Amendment does not protect a right to assisted suicide. The Court stated that the right to assisted suicide is not a fundamental right because it is not deeply rooted in the Nation's history and tradition, and it is not implicit in the concept of ordered liberty. The Court also noted that the right to assisted suicide is not a right that is essential to the concept of personal autonomy. The Court's decision in Washington v. Glucksberg was based on the fact that the right to assisted suicide is not a right that is deeply rooted in the Nation's history and tradition, and it is not implicit in the concept of ordered liberty. The Court also noted that the right to assisted suicide is not a right that is essential to the concept of personal autonomy.

rule has been violated and therefore petitioner had been deprived of a legal hearing. In People ex rel. Miller v. City of Chicago, supra, the court expressly left open the question of the right of the trial court in a mandamus action to review the commission's proceedings. These and other cases which might be added demonstrate that courts have no right in a mandamus proceeding to review the proceedings of the commission as was done on the issues formed in the cases at bar."

We have quoted extensively from the foregoing case because the court squarely decided therein the very questions presented on this appeal. As was said in that case, "courts have no right in a mandamus proceeding to review the proceedings of the commission as was done on the issues formed."

That case is controlling here and the judgment of the Circuit court of Cook county is therefore reversed.

JUDGMENT REVERSED.

Friend and Scanlan, JJ., concur.

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HABEL, ARMBRUSTER & LARSEN
COMPANY, a corporation,
Appellee,

v.

LOUIS ALLEVA and WILLIAM ALLEVA,
copartners, doing business as
ALLEVA BROS., and IRVING BLOOM,

On appeal of IRVING BLOOM,
Appellant.

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APPEAL FROM MUNICIPAL
COURT OF CHICAGO.
174
435

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This action of replevin was originally instituted by plaintiff, Habel, Armbruster & Larsen Company, against defendants, Louis Alleva and William Alleva, copartners, doing business as Alleva Bros. The property sought to be recovered was not in the possession of Alleva Bros. when the writ of replevin was served on them and the bailiff of the Municipal court of Chicago made a return "no property found." The machinery and equipment involved herein being in the possession of one Irving Bloom, he was impleaded by plaintiff as an additional party defendant. An alias writ of replevin was served on Bloom (hereinafter for convenience sometimes referred to as defendant), and the bailiff took possession of the property from him and delivered same to plaintiff. The cause was tried by the court without a jury upon a stipulation of facts. The trial court found the right to the possession of the property replevied in plaintiff and entered judgment on the finding. Bloom appeals.

June 17, 1938 Habel, Armbruster & Larsen Company was the owner of the machinery and equipment in question and on that date it entered into a conditional sale contract with Alleva Bros. whereby plaintiff agreed to sell said machinery and equipment to them for \$4,245.40. In connection with the conditional sale contract Alleva Bros., the purchasers, executed and delivered

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to plaintiff an installment promissory note, payable \$100 monthly with interest. Payments were made on account of said note and conditional sale contract, the last payment being on May 22, 1940, at which time the balance due on same was reduced to \$2,245. No further payments of either principal or interest were made on account of the conditional sale contract and note, although monthly payments of \$100 and interest were due on the first day of each month thereafter. During the period from June 17, 1938 to August, 1940, plaintiff sold flour on open account to Alleva Bros. and they were indebted to it on such open account in a sum in excess of \$6,000. In August, 1940, Alleva Bros. being in default under the original conditional sale contract as indicated, an arrangement was made between them and plaintiff for the execution of a new conditional sale contract in which the purchase price was to consist of the balance due under the original conditional sale contract, together with interest on said balance, and \$4,000 of the amount then due on the open account. However, Alleva Bros. took no steps to carry out this arrangement until October, 1940, when plaintiff refused to extend further credit to them for flour. Shortly after such refusal William Alleva went to plaintiff's office and again agreed with its president that he would enter into a new conditional sale contract, the sale price to be \$6,301.13. This consideration included, as under the August arrangement, the balance due on the original conditional sale contract and note, together with interest thereon, and \$4,000 of the amount due on the open account. On October 22, 1940, after this last mentioned agreement had been made, plaintiff through its attorneys sent a notice to Alleva Bros. of the cancellation and termination of the original conditional sale contract. Thereafter on November 1, 1940 a new conditional sale contract was executed by plaintiff and Alleva Bros. for the sale of the same machinery and equipment for \$6,301.13 in accordance with the terms previously agreed upon, and at the same time Alleva Bros. executed and delivered to plaintiff their installment promissory note for said amount. Nothing

to plaintiff an installment promissory note, payable \$100 monthly with interest. Payments were made on account of said note and conditional sale contract, the last payment being on May 22, 1940, at which time the balance due on same was reduced to \$2,247. No further payments of either principal or interest were made on account of the conditional sale contract and note, although monthly payments of \$100 and interest were due on the first day of each month thereafter. During the period from June 17, 1938 to August, 1940, plaintiff sold flour on open account to Allave Bros., and they were indebted to it on such open account in a sum in excess of \$6,000. In August, 1940, Allave Bros., being in default under the original conditional sale contract as indicated, an arrangement was made between them and plaintiff for the execution of a new conditional sale contract in which the purchase price was to consist of the balance due under the original conditional sale contract, together with interest on said balance, and \$4,000 of the amount then due on the open account. However, Allave Bros. took no steps to carry out this arrangement until October, 1940, when plaintiff refused to extend further credit to them for flour. Shortly after such refusal William Allave went to plaintiff's office and again agreed with its president that he would enter into a new conditional sale contract, the sale price to be \$6,301.13. This consideration included, as under the August arrangement, the balance due on the original conditional sale contract and note, together with interest thereon, and \$4,000 of the amount due on the open account. On October 22, 1940, after this last mentioned agreement had been made, plaintiff through its attorneys sent a notice to Allave Bros. of the cancellation and termination of the original conditional sale contract. Thereafter on November 1, 1940 a new conditional sale contract was executed by plaintiff and Allave Bros. for the sale of the same machinery and equipment for \$6,301.13 in accordance with the terms previously agreed upon, and at the same time Allave Bros. executed and delivered to plaintiff their installment promissory note for said amount. Nothing

was ever paid on account of either the principal or interest due under the new conditional sale contract and note of November 1, 1940.

Allewa Bros. ceased doing business in March, 1941. At that time they locked their premises, the property involved herein was pledged to Irving Bloom, an attorney, as security for \$1,500 attorney's fees claimed to be due him for services previously rendered to Allewa Bros. and the keys to said premises were delivered by them to Bloom. It was stipulated that if Bloom were called as a witness he would testify that he was a general creditor of Allewa Bros. during the period from 1939 to 1941 and was such a general creditor on November 1, 1940, the date of the execution of the new conditional sale contract.

On April 2, 1941 plaintiff caused notice of cancellation of the conditional sale contract of November 1, 1940 to be served upon Allewa Bros. At the time this suit was filed on May 16, 1941 plaintiff had no knowledge of any claim of Irving Bloom. As heretofore shown, Bloom was subsequently made an additional party defendant and the property recovered from him by the bailiff of the Municipal court.

The original conditional sale contract provides in part as follows: "After any default and repossession of the property, the Seller may make any disposition of the property that it deems fit, and if it desires to resell it may do so with or without notice, and with or without the property being at the place of sale, at private or public sale."

It is rather difficult to comprehend the grounds urged by Bloom for reversal and the arguments advanced by him in support thereof. His principal contention seems to be that because plaintiff did not actually and manually repossess the machinery and equipment after the default in payment of Allewa Bros. under the original conditional sale contract and the cancellation and termination of said contract, Habel, Armbruster & Larsen Company waived its reservation of title in and to the property sold and somehow or other Allewa

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On April 2, 1941 plaintiff caused notice of cancellation of the conditional sale contract of November 1, 1940 to be served upon Allve Bros. At the time this suit was filed on May 12, 1941 plaintiff had no knowledge of any claim of Irving Bloom. As heretofore shown, Bloom was subsequently made an additional party defendant and the property recovered from him by the bailiff of the Municipal court. The original conditional sale contract provides in part as follows: "After any default and repossession of the property, the Seller may make any disposition of the property that it deems fit, and if it desires to resell it may do so with or without notice, and with or without the property being at the place of sale, at private or public sale."

It is rather difficult to comprehend the grounds urged by Bloom for reversal and the arguments advanced by him in support thereof. His principal contention seems to be that because plaintiff did not actually and manually repossess the machinery and equipment after the default in payment of Allve Bros. under the original conditional sale contract and the cancellation and termination of said contract, Habel, Armbruster & Larsen Company waived its reservation of title in and to the property sold and somehow or other Allve

Bros. became vested with absolute title to same. It is true that both under the law and the terms of the original conditional sale contract plaintiff had the right to repossess the property but there was nothing in the contract and there is no rule of law with which we are familiar that divested plaintiff of its title because of its failure to repossess under the circumstances shown here. Notice of cancellation and termination of the original conditional sale contract having been given to Alleva Bros. on October 22, 1940 and the terms of the new conditional sale contract having been agreed upon prior to said date of cancellation, it would have been an idle, useless and unnecessary act for plaintiff to have actually repossessed the machinery and equipment which Alleva Bros. were using in the operation of their business. Merely because plaintiff did not see fit to repossess the property during the period from October 22, 1940 to November 1, 1940, pending the execution of the new conditional sale contract on the latter date, its terms having theretofore been agreed upon, it certainly did not follow that plaintiff waived its reservation of title to the property.

There has been no showing either under the facts or the law that plaintiff waived its reservation of title under the original conditional sale contract or that it was divested of said title and it is inconceivable how absolute title to the property could possibly have vested in Alleva Bros. who were in default under the original conditional sale contract which was cancelled and terminated. Alleva Bros. could only have acquired title by conveyance or by operation of law. Plaintiff certainly never conveyed title to Alleva Bros. and defendant has not pointed out or even suggested any rule or principle of law that operated to vest the legal title to the property in Alleva Bros.

Defendant also contends that "the real purpose that the parties sought to accomplish will govern the contracts, regardless of what name was given;" that "the so-called 'Conditional Sales Contract of Nov. 1, 1940,' was a 'cover' and a 'subterfuge' for

Contract of Nov. 1, 1940, was a 'cover' and a 'subterfuge' for of what name was given; that "the so-called 'Conditional Sales parties sought to accomplish will govern the contracts, regardless Defendant also contends that "the real purpose that the Bros. of law. Plaintiff certainly never conveyed title to Allava Bros. and Bros. could only have acquired title by conveyance or by operation conditional sale contract which was cancelled and terminated. Allava have vested in Allava Bros. who were in default under the original it is inconceivable how absolute title to the property could possibly conditional sale contract or that it was divested of said title and that plaintiff waived its reservation of title under the original There has been no showing either under the facts or the law of title to the property. upon, it certainly did not follow that plaintiff waived its reservation contract on the latter date, its terms having theretofore been agreed to November 1, 1940, pending the execution of the new conditional sale fit to repossess the property during the period from October 22, 1940 operation of their business. Merely because plaintiff did not see the machinery and equipment which Allava Bros. were using in the useless and unnecessary act for plaintiff to have actually repossessed upon prior to said date of cancellation, it would have been an idle, and the terms of the new conditional sale contract having been agreed sale contract having been given to Allava Bros. on October 22, 1940 Notice of cancellation and termination of the original conditional of its failure to repossess under the circumstances shown here, which we are familiar that divested plaintiff of its title because there was nothing in the contract and there is no rule of law with contract plaintiff had the right to repossess the property but Bros. became vested with absolute title to same. It is true that both under the law and the terms of the original conditional sale

a mortgage or pledge;" that "there was no sale in fact on Nov 1, 1940;" and that "therefore, there could be no conditional sales contract."

Thus we have the question presented as to whether plaintiff and Alleva Bros. entered into a valid "Conditional Sales Contract" on November 1, 1940. Much space is devoted in defendant's brief in an attempt to show that said instrument of November 1, 1940 was not a contract of sale at all and therefore could not have been a conditional sale contract because of the inclusion therein as part of the purchase price of the \$4,000, which, as has been shown, was part of a balance due from Alleva Bros. to plaintiff on an open account for flour sold by the latter to the former. Defendant states in his brief "that the purported Conditional Sales Contract actually was given to secure an unrelated indebtedness, and was merely a 'cover' or 'subterfuge' for a mortgage or a pledge." This statement finds absolutely no support in the evidence and moreover the facts and circumstances clearly show that it was the purpose and intention of Alleva Bros. and plaintiff to enter into a conditional sale contract when they executed the instrument, entitled as such, on November 1, 1940. Did the inclusion of the \$4,000 as part of the purchase price in the conditional sale contract of November 1, 1940 invalidate same? We think not. It is true that at the time the second conditional sale contract was executed on November 1, 1940 the purchase price was increased to include part of an unsecured indebtedness to plaintiff by Alleva Bros. However, in view of the fact that the first contract had been cancelled and terminated, the parties were free to act as they saw fit and we perceive no valid reason why plaintiff and Alleva Bros. could not enter into a new conditional sale contract and include therein such terms as to the sale price and consideration as they might agree upon, provided none of the terms was contrary to law or against public policy. The validity of such procedure is recognized in 55 C. J. 1196, sec. 1173. That section provides in part as follows:

"A conditional sale contract may impose conditions other

a mortgage or pledge; that "there was no sale in fact on Nov. 1, 1940;" and that "therefore, there could be no conditional sales contract."

Thus we have the question presented as to whether plaintiff and Alleva Bros. entered into a valid "Conditional Sales Contract" on November 1, 1940. Much space is devoted in defendant's brief to an attempt to show that said instrument of November 1, 1940 was not a contract of sale at all and therefore could not have been a conditional sales contract because of the inclusion therein as part of the purchase price of the \$4,000, which, as has been shown, was part of a balance due from Alleva Bros. to plaintiff on an open account for flour sold by the latter to the former. Defendant states in his brief "that the purported Conditional Sales Contract actually was given to secure an unrelated indebtedness, and was merely a 'cover' or 'subterfuge' for a mortgage or a pledge." This statement finds absolutely no support in the evidence and moreover the facts and circumstances clearly show that it was the purpose and intention of Alleva Bros. and plaintiff to enter into a conditional sales contract when they executed the instrument, entitled as such, on November 1, 1940. Did the inclusion of the \$4,000 as part of the purchase price in the conditional sales contract of November 1, 1940 invalidate same? We think not. It is true that at the time the second conditional sales contract was executed on November 1, 1940 the purchase price was increased to include part of an unsecured indebtedness to plaintiff by Alleva Bros. However, in view of the fact that the first contract had been cancelled and terminated, the parties were free to act as they saw fit and we perceive no valid reason why plaintiff and Alleva Bros. could not enter into a new conditional sales contract and include therein such terms as to the sale price and consideration as they might agree upon, provided none of the terms was contrary to law or against public policy. The validity of such procedure is recognized in W.C. 1. 1190, sec. 1173. That section provides in part as follows:

"A conditional sales contract may impose conditions other

than or in addition to payment of the purchase price provided they are not inconsistent with a retention of title in the buyer [seller] and provided they are not contrary to statute or in contravention of some principle of public policy; and hence it has been held permissible to impose, among other conditions, a condition that the buyer shall pay not only the price of the property but any other indebtedness of his to the seller."

As already stated Alleva Bros. made no payments under the conditional sale contract of November 1, 1940 and went out of business in March, 1941, at which time they locked up their premises and turned over the keys to their place of business to Bloom. The latter claims that at that time the machinery and equipment were pledged to him as security for the payment of \$1,500 attorney's fees for services theretofore rendered by him to Alleva Bros. What rights did Bloom acquire by the alleged pledge to him by Alleva Brothers? Only such rights as they had, and holding as we do, that the conditional sale contract of November 1, 1940 was valid, Alleva Bros. had at the most an equity in the property and could not vest Bloom with a clear, unencumbered legal title to it. Bloom, having acquired his rights, if any, through Alleva Bros., merely stands in their place and is therefore not entitled to the property as against plaintiff's claim to it.

The equities in this case are entirely with plaintiff. It is not denied that at the time the writ of replevin was served, the amount due under the conditional sale contract of November 1, 1940 was justly owing to plaintiff for property delivered to Alleva Bros., that the latter had defaulted in their payments under said contract and that they had ceased doing business.

We have carefully examined and considered the authorities cited by defendant in support of his various contentions but deem it unnecessary to discuss same, since none of them is applicable to the factual situation presented here.

We are impelled to hold that the trial court did not err in its finding that the right to possession of the property involved herein "is in the plaintiff." Therefore the judgment of the Municipal court of Chicago is affirmed.

Friend and Scanlan, JJ., concur.

JUDGMENT AFFIRMED

than or in addition to payment of the purchase price provided they are not inconsistent with a retention of title in the buyer [seller] and provided they are not contrary to statute or in contravention of some principle of public policy and hence it has been held permissible to impose, among other conditions, a condition that the buyer shall pay not only the price of the property but any other indebtedness of his to the seller."

As already stated Allave Bros. made no payments under the conditional sale contract of November 1, 1940 and went out of business in March, 1941, at which time they looked up their premises and turned over the keys to their place of business to Bloom. The latter claims that at that time the machinery and equipment were pledged to him as security for the payment of \$1,500 attorney's fees for services therefore rendered by him to Allave Bros. What rights did Bloom acquire by the alleged pledge to him by Allave Brothers? Only such rights as they had, and holding as we do, that the conditional sale contract of November 1, 1940 was valid, Allave Bros. had at the most an equity in the property and could not vest Bloom with a clear, unencumbered legal title to it. Bloom, having acquired his rights, if any, through Allave Bros., merely stands in their place and is therefore not entitled to the property as against plaintiff's claim to it.

The equities in this case are entirely with plaintiff. It is not denied that at the time the writ of replevin was served, the amount due under the conditional sale contract of November 1, 1940 was justly owing to plaintiff for property delivered to Allave Bros., that the latter had defaulted in their payments under said contract and that they had ceased doing business.

We have carefully examined and considered the authorities cited by defendant in support of his various contentions but deem it unnecessary to discuss same, since none of them is applicable to the factual situation presented here.

We are impelled to hold that the trial court did not err in its finding that the right to possession of the property involved herein "is in the plaintiff." Therefore the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend and Scamler, JJ., concur.

42485

FLORENCE M. BLUMBERG,
Appellee,

v.

WILLIAM M. BAIRD,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

319 1A 12

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff resided with her husband as tenants on the third floor of an apartment building at 1314 East 54th street, Chicago, Illinois. At about 5:30, on the evening of March 4, 1938, she slipped and fell on the top step of the back stairway of the building, and sustained injuries, for which she sued defendant as owner. Trial by jury resulted in a verdict and judgment for plaintiff in the sum of \$800, from which defendant has taken an appeal.

Defendant offered no evidence, all of the testimony having been adduced by plaintiff's witnesses. There is substantially no dispute as to the salient facts. The entire day was gray and dismal, with rain, snow and sleet falling almost continuously. The temperature ranged from 23 to 34 degrees. Toward evening plaintiff left the rear entrance of her apartment on the way to market and walked across the covered porch, which was dry. It was light enough so that she could see the steps, about ten feet away. She started down the back stairway, taking hold of the railing, which was covered with a glary slippery sheet of ice, as she described it, slipped on the first step of the stairway and was thrown seven or eight steps to the next landing. From her own testimony it appears that she knew there was ice and snow on the steps, but she contends that there was a lumpy ice formation beneath the snow of which she was unaware.

The complaint is predicated on the theory that she was in the exercise of due care and caution for her own safety; that defendant, who owned and operated the building, was in duty bound

defendant, who owned and operated the building, was in duty bound the exercise of due care and caution for her own safety; that The complaint is predicated on the theory that she was in

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that there was a lumpy ice formation beneath the snow of which she that she knew there was ice and snow on the steps, but she contends eight steps to the next landing. From her own testimony it appears slipped on the first step of the stairway and was thrown seven or covered with a glass slippery sheet of ice, as she described it, down the back stairway, taking hold of the railing, which was that she could see the steps, about ten feet away. She started across the covered porch, which was dry. It was light enough so the rear entrance of her apartment on the way to market and walked stairs ranged from 23 to 34 degrees. Toward evening plaintiff left with rain, snow and sleet falling almost continuously. The temper- dispute as to the salient facts. The entire day was gray and dismal, been adduced by plaintiff's witnesses. There is substantially no Defendant offered no evidence, all of the testimony having the sum of \$800, from which defendant has taken an appeal. Trial by jury resulted in a verdict and judgment for plaintiff in ing, and sustained injuries, for which she sued defendant as owner. slipped and fell on the top step of the back stairway of the build- Illinois. At about 7:30, on the evening of March 4, 1938, she floor of an apartment building at 1314 East 24th street, Chicago. Plaintiff resided with her husband as tenants on the third

WILLIAM M. BAIRD, Appellant.
v.
FLORENCE M. BLUMBERG, Appellee.

COOK COUNTY.
APPEAL FROM CIRCUIT COURT.

to keep the premises in a reasonably safe condition; and that his failure so to do constituted negligence, for which he rendered himself liable to various tenants who used the rear stairway in common.

A former janitor, John Haenson, who regularly cared for the premises, was absent on account of illness, and Emil Flerick attended to the janitor work on the day of the accident. Flerick, called as a witness by plaintiff, testified that in the course of his duties he took care of the furnace, removed the garbage and cleaned the back stairs whenever it was necessary. On the day in question, because of the continuous rain, snow and sleet, he cleaned the stairs three or four times and as late as 4 o'clock in the afternoon, and scattered ashes on the steps in the forenoon.

Plaintiff's husband testified that "through the day it mostly rained and snowed, and it was freezing." Mrs. Blumberg stated that it had been "a gray, dismal day, snowed off and on throughout the day, sleeted and rained." It was not quite dark at the time of the accident and she could see that "it was misting and sort of a rainfall falling. *** I knew that there was some formation of ice on the stairs. I felt the ice when I put my right hand on the rail. It was covered with a glary, slippery coat of ice and the railing was wet and also exposed to the elements. I took hold of the railing and stepped about the same time. When I got to the top of the stairs and before I started down I looked at the stairs and there was ice and snow on them. I stepped off onto the first step and my foot slipped. It was so slippery that when my maid came down and assisted me we both had difficulty getting back upstairs. My husband came shortly afterwards. He came up the back way. We went to the Billings Hospital out of the front way. There was ice out on the sidewalk in front, on the streets, and all over Chicago as far as I know."

The legal aspects of the case present no serious difficulty.

to keep the premises in a reasonably safe condition; and that his failure so to do constituted negligence, for which he rendered himself liable to various tenants who used the rear stairway in common.

A former janitor, John Hanson, who regularly cared for the premises, was absent on account of illness, and Emil Fliesick attended to the janitor work on the day of the accident. Fliesick called as a witness by plaintiff, testified that in the course of his duties he took care of the furnace, removed the garbage and cleaned the back stairs whenever it was necessary. On the day in question, because of the continuous rain, snow and sleet, he cleaned the stairs three or four times and as late as 4 o'clock in the afternoon, and scattered ashes on the steps in the forenoon.

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The legal aspects of the case present no serious difficulty.

In order to recover it was incumbent on plaintiff to allege and prove not only that defendant was negligent because of his failure to maintain the stairway in a reasonably safe condition, but also that she was in the exercise of due care and caution for her own safety. With respect to the latter phase of the case it is apparent from plaintiff's own evidence that the condition of the stairway, covered as it was with snow and ice because of the weather conditions prevailing throughout the entire day, was as well known to her, or probably more so, than to the defendant or anyone in his employ, and defendant's counsel says that under the circumstances she was negligent. Under similar circumstances we have held that a plaintiff who was aware of the danger of passing over a defective floor was precluded from recovering for resulting injuries. Martin v. Surman, 116 Ill. App. 282. In Illinois Central R. R. v. Oswald, 338 Ill. 270, it was held that "A party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." In Brunet v. Kresge Co., 115 Fed. (2d) 713, plaintiff charged that defendant was negligent in permitting a stairway in its store to become and remain slippery from water and snow. As she entered defendant's store, she started down the steps to the basement, and noticing that the steps were muddy and slippery, she took hold of the banister to keep from falling, but as she reached the fourth or fifth step from the top, her foot slipped and she fell to the landing. The snow and slush on the stairway was tracked in by customers, and the slippery condition was not created by defendant's act. The Circuit court of appeals for this district, quoting from Murray v. Bedell Co., 256 Ill. App. 247, wherein it was held that the trial court should have directed a verdict in favor of defendant, said: "'From the testimony of the plaintiff it is apparent that the danger, if any, was clearly evident to her, as well as the defendants, and that she was aware of the condition

in order to recover it was incumbent on plaintiff to prove not only that defendant was negligent because of his failure to maintain the stairway in a reasonably safe condition, but also that she was in the exercise of due care and caution for her own safety. With respect to the latter phase of the case it is apparent from plaintiff's own evidence that the condition of the stairway, covered as it was with snow and ice because of the weather conditions prevailing throughout the entire day, was as well known to her, or probably more so, than to the defendant or anyone in his employ, and defendant's counsel says that under the circumstances she was negligent. Under similar circumstances we have held that a plaintiff who was aware of the danger of passing over a defective floor was precluded from recovering for resulting injuries. Martini v. Surman, 116 Ill. App. 282. In Illinois Central R. Co. v. Gwalt, 338 Ill. 270, it was held that "a party has no right to knowingly expose himself to danger and then recover damages for an injury which he might have avoided by the use of reasonable precaution." In Brunet v. Kreske Co., 112 Ill. App. 254, plaintiff charged that defendant was negligent in permitting a stairway in its store to become and remain slippery from water and snow. As she entered defendant's store, she started down the steps to the basement, and noticing that the steps were muddy and slippery, she took hold of the banister to keep from falling, but as she reached the fourth or fifth step from the top, her foot slipped and she fell to the landing. The snow and sleet on the stairway was tracked in by customers, and the slippery condition was not created by defendant's act. The Circuit Court of appeals for this district, quoting from Murray v. Behell Co., 256 Ill. App. 241, wherein it was held that the trial court should have directed a verdict in favor of defendant, said: "From the testimony of the plaintiff it is apparent that the danger, if any, was clearly evident to her, as well as the defendants, and that she was aware of the condition

and of the possibility of sustaining a fall before she undertook to pass over and along the floor space of the vestibule. *** In the case at bar the plaintiff was as well apprised of the condition existing in the vestibule as the defendant, and should be held to as high a degree of care for her own safety as would be required of the defendant.'" In the Brunet case the court made the following observation: "It is obvious in the case at bar that nothing was hidden from appellee, that she was well aware of the slippery and wet condition of the stairway as she started to descend it. She stated that she took hold of the banister as she started down because she realized that there was a possibility of falling. She presumed that her own galoshes were wet as she entered the store, having walked through the slush and snow, and she could see that there was slush and snow on the stairs tracked in by other people."

Plaintiff seeks to distinguish the Brunet case from the case at bar by pointing out the testimony that the janitor had mopped the stairs in the Kresge store about 11:15 in the morning and that the accident occurred some 30 minutes later. In the case at bar plaintiff's witness Flerick testified that he had cleaned the steps as late as 4 o'clock, which was only an hour and a half before the accident, and we see no difference in principle between the two situations. Likewise, it is urged that in Murray v. Bedell, the doorman squeegeed the vestibule at 10 in the morning and again shortly after noon, and the accident occurred about 1:15 in the afternoon. Here again the difference of a few minutes in point of time would not change the principle of law invoked.

It must be conceded, of course, that the question of contributory negligence is ordinarily one of fact for the jury, but the law is equally well settled that where there is no conflict in the evidence and where the facts are not in dispute, the question becomes one of law for the court. Beidler v. Branshaw, 200 Ill. 425. As heretofore indicated, one who blames another for an injury

and of the possibility of sustaining a fall before she undertook to pass over and along the floor space of the vestibule. *** In the case at bar the plaintiff was as well apprised of the condition existing in the vestibule as the defendant, and should be held to as high a degree of care for her own safety as would be required of the defendant." In the Bruneel case the court made the following observation: "It is obvious in the case at bar that nothing was hidden from appellee, that she was well aware of the slippery and wet condition of the stairway as she started to descend it. She stated that she took hold of the banister as she started down because she realized that there was a possibility of falling. She presumed that her own gaiters were wet as she entered the store, having walked through the slush and snow, and she could see that there was slush and snow on the stairs tracked in by other people."

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must allege and affirmatively prove that he himself was in the exercise of due care and caution for his own safety, and we think plaintiff's conduct, whether it be characterized as the assumption of risk of the hazards and dangers of the condition of the back stairway, which were plain, open and obvious to her, as defendant argues, or contributory negligence, the fact remains that plaintiff was fully as cognizant of the slippery condition of the back stairway, and probably more so, than the defendant or anyone in his employ, and was therefore charged with a duty equally as great as that sought to be imposed upon defendant. As was stated in Sanders v. Smith, 25 N. Y. Supp. 125, "To require the defendant to pay her [plaintiff] for her injuries would be to require the defendant to take better care of the plaintiff than she should take of herself."

With respect to the charge of negligence it is conceded that defendant as owner, maintaining and operating the apartment building, was charged with the duty of ordinary care in maintaining the back stairway in a reasonably safe condition. However, the evidence indicates that it would have been impossible to keep the back stairway entirely clear during continuous snow and rain accompanied by subfreezing temperature. In Riley v. Rhode Island Co., 69 Atl. 338, the court, quoting from Palmer v. Pennsylvania Co., 111 N. Y. 488, said that "'The immediate and continuous removal of all snow and ice from such trains, or the covering of them with sand or ashes in such manner that no slippery places shall be at any time exposed, would be quite impracticable and beyond the duty which a railroad owes to its passengers. The presence of snow or ice upon exposed places on moving cars is an accident of the hour, and no ordinary diligence could, during the prevalence of a storm, wholly remove its effects from the places exposed to its action, so as to prevent accidents to heedless and inattentive travelers.'" In Mallock v. Ballachey, 258 N. Y. App. Div. 774, 15 N. Y. S. (2d) 853, plaintiff

must allege and affirmatively prove that he himself was in the exercise of due care and caution for his own safety, and we think plaintiff's conduct, whether it be characterized as the assumption of risk of the hazards and dangers of the condition of the back stairway, which were plain, open and obvious to her, as defendant argues, or contributory negligence, the fact remains that plaintiff was fully as cognizant of the slippery condition of the back stairway, and probably more so, than the defendant or anyone in his employ, and was therefore charged with a duty equally as great as that sought to be imposed upon defendant. As was stated in Sanders v. Smith, 25 N. Y. Supp. 125, "To require the defendant to pay her [plaintiff] for her injuries would be to require the defendant to take better care of the plaintiff than she should take of herself."

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slipped and fell on an icy step of defendant's apartment building, and in reversing judgment for plaintiff and dismissing her complaint, the court said that "A careful consideration of the evidence in this case leads to the conviction that, considering the nature of the weather at the time of the accident, and considering the care used in the maintenance and care of the porch roof, there was no condition of defendant's porch and steps that could be called negligent.

*** It is unreasonable to expect sidewalks and outside steps to be kept entirely free from snow and ice in this climate in the winter time." In the case at bar the condition of the stairway was one caused by the elements, which were such as to render it fairly impossible for defendant to keep the stairway entirely free from ice and snow. The evidence discloses that defendant used ordinary care in maintaining the stairway in a reasonably safe condition by causing the janitor to sweep it three or four times in the course of the day, and to sprinkle ashes thereon. Nothing short of constant attention would have made it possible to remove the snow as it fell and froze throughout the day, and the law does not impose any such rigid duty on a landlord.

In the light of these conclusions we are of opinion that the court should have instructed the jury to return a verdict for defendant, or should have entered judgment notwithstanding the verdict. The judgment of the Circuit court is therefore reversed.

JUDGMENT REVERSED.

Friend and Scanlan, JJ., concur.

42380

GUARDIAN ELECTRIC MANUFACTURING
COMPANY, a corporation,
Appellee,

v.

NATIONAL MINERAL COMPANY, a
corporation,
Appellant.

NATIONAL MINERAL COMPANY, a
corporation, (counter-plaintiff),
Appellant,

v.

GUARDIAN ELECTRIC MANUFACTURING
COMPANY, a corporation, (counter-
defendant),
Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

437
319 I.A. 642

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant for a balance of \$766.72, alleged to be due for certain electric switches or relays manufactured specially by plaintiff and delivered to defendant for use in a newly designed hair-waving machine. Defendant denied liability on the ground of defective merchandise, and breaches of express and implied warranties, and also interposed a counterclaim seeking affirmative damages of \$2,883.06 for expenses and transportation, labor and material in uncrating, removing, adjusting, reassembling, rechecking and retransporting defective machines returned by its customers. The cause was tried by the court without a jury, resulting in finding and judgment in favor of plaintiff on its statement of claim and against defendant on its counterclaim, from which defendant has taken an appeal.

From the salient facts adduced in an extended hearing before the court, it appears that defendant was for many years engaged in the manufacture of permanent hair-waving machines and appliances used in so-called beauty parlors. Late in 1938 its engineers developed a remote control waving machine, requiring that indicator lights of green and red be turned on and off by

GUARDIAN ELECTRIC MANUFACTURING
COMPANY, a corporation,
Defendant.

NATIONAL MINERAL COMPANY, a
corporation,
Defendant.

ALLIED PACIFIC

CHICAGO, ILLINOIS

NATIONAL MINERAL COMPANY, a
corporation, (counter-plaintiff),
Defendant.

GUARDIAN ELECTRIC MANUFACTURING
COMPANY, a corporation, (counter-
defendant),
Defendant.

MR. JUSTICE FRANK DELIVERED THE OPINION OF THE COURT.

Plaintiff and defendant for a writ of \$750,000.

alleged to be due for certain electric machines or parts

manufactured specially by plaintiff and delivered to defendant

for use in a newly designed hair-waving machine. Defendant

denied liability on the ground of defective workmanship, and

promises of express and implied warranties, and also introduced

a counterclaim seeking affirmative damages of \$2,800.00 for

expenses and transportation, labor and material in restoring,

removing, adjusting, reassembling, reworking and retransporting

defective machines returned by its customers. The case was tried

by the court without a jury, resulting in the judgment in

favor of plaintiff on its statement of claim and which is set forth

on its counterclaim, from which defendant has taken an appeal.

From the salient facts adduced in an extended hearing

before the court, it appears that defendant was for many years

engaged in the manufacture of permanent hair-waving machines and

appliances used in so-called beauty parlors. Late in 1917 the

engineers developed a remote control wiring machine, consisting

that indicator lights of green and red be turned on and off by

means of automatic electric switches, called relays, when heated ready for use, a device which had not before been used by any manufacturer.

Plaintiff was engaged in the manufacture of relays of all types, and had, from March 1938, to December 1939, advertised in trade magazines, and held itself out in its catalogue as a specialist in the production of relays suitable for various purposes. The following are examples of the type of its advertisements and the representations made:

"('Electrical Manufacturing' magazine) All new Guardian relays are proven in the plant of Guardian Electric Co. before production begins; before any relay goes into production 'Guardian Experimental Department' must test it in innumerable ways. We must know in advance that your relays will perform as expected. A uniform dependable faultless product is the result *** No complaints, no post mortems, Experimental Department (photo) where a hundred variations of one relay are tested under the most extreme conditions before the final design reaches Guardian's production lines *** 'Ask us to make specific recommendations to fit your special requirements.' When seeking a better source for relays remember it is high quality that counts. (Def. Ex. A1, Rec. 660.)

"('Electrical Mfr.' magazine) Relays by Guardian take problems in easy stride. Investigate relays by Guardian immediately to improve your product, make your machine more responsive, efficient, etc.

"Find out how innumerable types of control units may comprise small relays, discs, contact, combinations, stepping switches, solenoids, auxiliary, time delay, muting and holding relays, metal housing, and brackets, and other special parts - designed for compactness - every part fabricated, tested, and assembled in one plant *** Guardian's. 'Ask us to make specific

means of automatic electric switches, called relays, and provided ready for use, a device which had not before been made by any manufacturer.

Plaintiff was engaged in the manufacture of relays of all types, and had, from March 1937, to December 1939, developed in trade magazines, and held itself out in its literature as a specialist in the production of relays suitable for various purposes. The following are examples of the type of its advertisements and the representations made:

"('Electrical Engineering' magazine) All new Guardian relays are proven in the plant of Guardian Electric Co., before production begins; before any relay goes into production 'Guardian Experimental Department' must test it in innumerable ways. We must know in advance what your relays will perform as expected. A uniform dependable function is the result *** No complaints, no post mortems, Experimental Department (photo) where a hundred variations of one relay are tested under the most extreme conditions before the final design reaches Guardian's production lines *** Ask us to make specific recommendations to fit your special requirements. When seeking a better source for relays remember it is high quality that

counts. (Det. Ex. A1, Rec. 600.)

"('Electrical Mfr.' magazine) Relays by Guardian take problems in easy stride. Investigate relays by Guardian immediately to improve your product, make your machine more responsive, efficient, etc.

"Find out how innumerable types of control units may comprise small relays, discs, contact, commutators, timing switches, solenoids, auxiliary, time delay, timing and holding relays, metal housing, and brackets, and other special parts - designed for compactness - every part fabricated, tested, and assembled in one plant *** Guardian's. Ask us to make specific

recommendations to fit your special requirements.' (Rec. 661, Def. Ex. A2).

"('Electrical Mfr.' magazine) Small relays by Guardian possess surprising ability to overcome many perplexing design and assembly problems. *** Your controls may consist of stepping switches, etc. (as in Def. Ex. A2), singly or in combination with discs, metal housings, brackets, leads and special parts. Here at Guardian you can get all these plus a better control completely designed, fabricated, and tested in one plant. *** Submit your problem, let Guardian solve it. (Def. Ex. A3; Rec. 662.)

"('Product Engineering' magazine) Bring your control problems to Guardian. Our experience gained through the design, development and production of thousands of electrical controls - from small simple relays to intricate combinations - can turn your 'headaches' into quick correct answers. Anything from a simple contact switch to a complex relay can be compactly designed, completely fabricated and tested at Guardian's - delivered ready for mounting in your machine *** consultation and suggestions given without cost. Let Guardian engineers work with you - for you. *** Ask us to make specific recommendations. (Rec. 663, Def. Ex. A4.)

"('Electrical Mfr.' magazine) Spring leaf contact switches. Made of special alloy phosphor bronze with pure silver contact points. Unique manufacturing process enables us to produce any angle or shape desired. Will hold their form indefinitely. *** Built to operate on any desired pressure. Write for sample. Send specifications of job you have in mind. Without cost we will submit specially built sample and quote price. (Rec. 664, Def. Ex. A5.)

"('Machine Design' magazine). Ask us to make specific recommendations to fit your special requirements. ('Electrical Manufacturing' magazine) No matter how simple or how exacting our requirements may be, relays by Guardian will meet them."
(italics ours.)

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"('Machine Design' magazine). Ask us to make specific recommendations to fit your special requirements. ('Electrical Manufacturing' magazine) No matter how simple or how exacting our requirements may be, relays by Guardian will meet them."

Julius Glasser, who had for several years been plant superintendent for defendant, testified that he and other members of its engineering department had read the advertisements appearing in the foregoing technical periodicals, and were seeking a source through which they could obtain relays suitable for their purpose. Accordingly they called the plaintiff corporation, which sent A. J. Steere, its sales engineer, to defendant's plant, in the latter part of 1938. One of the machines had been built and was operating in defendant's plant, but without a relay, and Glasser explained its mechanism to Steere, and asked for a recommendation as to the type and style of relay adaptable to that particular machine. Steere examined the circuit and unit in operation, and assured Glasser that his company could make and deliver a relay for such an instrument. Glasser "indicated the function of the machine [and] gave him [Steere] its electrical values." Shortly thereafter plaintiff sent a pair of relays to defendant's plant, known as "break-before-make" relays, "which means that the upper contacts disconnect before the lower set connects." Upon installation of these relays it was found that the lights flickered, and on examination it was disclosed that the leaves supporting the contacts were not properly adjusted, with the result that the green light flickered or did not go on, and therefore the machine could not be used. A week later Glasser called Steere, who came to defendant's plant, and suggested "that he and Mr. Gold, one of our engineers, take the head of the machine to the Guardian plant to be examined further by their engineers. I discussed fully with Mr. Steere the technical applications. He indicated he knew relays." Thereafter, early in January 1939, plaintiff sent more relays of the same type to defendant's plant. They still presented difficulties and had to be adjusted, and Glasser so advised Steere, and suggested that plaintiff check the relays fully before shipping them. He testified that he had told Steere, at their first meeting, that defendant wanted

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a relay which could be installed in the machine without any adjustment, and Steere assured him that plaintiff could supply such a unit. The type of relay, as modified, was an improvement over the original type but still required slight adjustment, and after defendant again indicated its dissatisfaction, further discussions were had, resulting in a third type of relay which eliminated considerable chattering, but still had to be adjusted on defendant's assembly line in the course of production, which began in March or April, 1939.

Several weeks after the new type waving-machines had been shipped, many of them were returned by defendant's customers. Upon examination it was found that the spring leaves of the relays would not hold their position, and Glasser explained the major difficulties with the relays as follows: "(1) the contacts would become charred and show signs of rings and imperfect connection due to arcing; (2) sponginess or looseness in the pile-ups which support the leaves; and (3) the position of the leaves was changed." He testified that these particular defects could not be found by an ordinary preliminary inspection, and were discovered only by taking several relays apart and examining them closely when the return of the machines became a problem. Based upon his education and practical experience, Glasser's opinion was that the type of relays made and delivered by plaintiff would not stand up under continued operations in the hands of customers; that "the contacts have not been properly handled, and the construction of the pile-up is such as to allow surface defects and conditions which create difficulty after the relay is in the field." Following the return of many machines shipped to its customers, defendant bought other relays from Automatic Electric Company (sample of which, together with the type of relays submitted and made by plaintiff, was introduced in evidence), and installed them in its machines. The function of the new relays purchased was exactly the same as those manufactured by plaintiff, and Glasser testified that they had no complaints and that the Automatic Electric Company relay functioned satisfactorily for the purpose

Electric Company relay functioned satisfactorily for the purpose testified that they had no complaints and that the automatic exactly the same as those manufactured by plaintiff, and Glasser in its machines. The function of the new relays purchased was made by plaintiff, was introduced in evidence, and installed them (sample of which, together with the type of relays submitted and were, defendant bought other relays from Automatic Electric Company field." Following the return of many machines shipped to its customer and conditions which create difficulty after the relay is in the the construction of the pile-up is such as to allow surface defects of customers; that "the contacts have not been properly handled, and plaintiff would not stand up under continued operations in the hands Glasser's opinion was that the type of relay made and delivered by became a problem. Based upon his education and practical experience, apart and examining them closely when the return of the machines many inspection, and were discovered only by taking several relays these particular defects could not be found by an ordinary preliminary and (3) the position of the leaves was changed." He testified that sponginess or looseness in the pile-ups which support the leaves; and show signs of rings and imperfect connection due to arcing; (2) with the relays as follows: "(1) the contacts would become shaded not hold their position, and Glasser explained the major difficulties examination it was found that the spring leaves of the relays would shipped, many of them were returned by defendant's customers. Upon several weeks after the new type weaving-machines had been course of production, which began in March or April, 1939.

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for which it was used. Defendant's counsel says that of the 1500 machines shipped to its customers, over 1454 were returned as defective, and the reports made by the inspection department so indicated. Reno Andreotti, an assembler and inspector of returned goods at defendant's plant, testified that his examination showed 90 per cent of the machines "had relay trouble. The contact springs were warped and loose, or couldn't make contact, or were corroded. As a result the lights flickered on and off." On oral argument plaintiff sought to explain the difficulties encountered in the operation of its relays by stating that defendant made some adjustment before installing the relays, which accounted for their failure to stand up in actual operation, and that many of the machines were returned because of defects other than in the relays. However, Andreotti testified that attempts had been made to adjust the relays in returned machines by tightening the tension of the springs with pliers, but that such adjustment remedied the defect only temporarily, and "They just didn't hold their position ***. The springs, either the top or bottom, were bent and were not making the right contact. The warping was not due to the adjusting of the relays by straightening. That was the only adjustment we made."

From an examination of the record, and especially of the numerous inspection sheets introduced in evidence, no other conclusion can fairly be reached than that the relays manufactured by plaintiff were defective, either in material or construction, or both, and that they could not be used satisfactorily or for any length of time in defendant's machines. The relays ultimately purchased from Automatic Electric Company were of better construction and design, proved uniformly satisfactory, and were free from any of the defects found in plaintiff's relays.

Plaintiff does not seriously question the failure of its relays to operate satisfactorily in defendant's machine. It tried its case on the theory that it delivered the relays on written

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orders of the defendant in accordance with samples previously furnished; that the merchandise was received, inspected, installed and adjusted by defendant and retained for more than a reasonable time after an opportunity for inspection had been afforded; and that there can be no implied warranty of fitness for the purpose intended in the sale of an article by sample. The court evidently adopted plaintiff's view. An examination of the pleadings and record does not sustain that theory of the case. Plaintiff's statement of claim merely alleges in three numbered paragraphs, without designation as counts, a claim for a balance of \$766.72, allegedly due (1) for goods, wares and merchandise sold and delivered at the special request of defendant, (2) for goods, wares and merchandise specially manufactured on defendant's instructions and delivered to defendant, and (3) on an account stated. Defendant moved to strike the statement of claim on the ground that (1) it failed to allege whether the sale was by sample, description or otherwise, (2) it failed to allege the special instructions for manufacture, and (3) no date, time or place was alleged as to the purported account stated; but the court overruled defendant's motion, and it then filed an affidavit of defense and counterclaim, as amended, wherein it denied in haec verba the allegations of the statement of claim, and averred specifically (1) that the goods in question were complete electrical units called relays, manufactured by plaintiff for installation in permanent waving machines manufactured by defendant; that the relays were expressly and impliedly warranted to be fit for the specific purpose for which they were to be used; that the goods were defective in specified respects; that when defendant notified plaintiff of these defects, plaintiff tried to correct them and offered to take back the relays without charging therefor, but refused to pay damages; (2) that plaintiff expressly warranted its relays could be used in defendant's machines without adjustment, and breached this warranty, because they could not so be used; and (3) that plaintiff expressly

orders of the defendant in accordance with samples previously furnished; that the merchandise was received, inspected, installed and adjusted by defendant and retained for more than a reasonable time after an opportunity for inspection had been afforded; and that there can be no implied warranty of fitness for the purpose intended in the sale of an article by sample. The court evidently adopted plaintiff's view. An examination of the pleadings and record does not sustain that theory of the case. Plaintiff's statement of claim merely alleges in three numbered paragraphs, without designation as counts, a claim for a balance of \$966.75, allegedly due (1) for goods, wares and merchandise sold and delivered at the special request of defendant, (2) for goods, wares and merchandise specially manufactured on defendant's instructions and delivered to defendant, and (3) on an account stated. Defendant moved to strike the statement of claim on the ground that (1) it failed to allege whether the sale was by sample, description or otherwise, (2) it failed to allege the special instructions for manufacture, and (3) no date, time or place was alleged as to the purported account stated; but the court overruled defendant's motion, and it then filed an affidavit of defense and complaint, as amended, wherein it denied in hoc verba the allegations of the statement of claim, and averred specifically (1) that the goods in question were complete electrical units called relays, manufactured by plaintiff for installation in permanent waving machines manufactured by defendant; that the relays were expressly and impliedly warranted to be fit for the specific purpose for which they were to be used; that the goods were defective in specified respects; that when defendant notified plaintiff of these defects, plaintiff tried to correct them and offered to take back the relays without charging therefor, but refused to pay damages; (2) that plaintiff expressly warranted its relays could be used in defendant's machines without adjustment, and breached this warranty, because they could not so be used; and (3) that plaintiff expressly

warranted its relays were of the best materials and workmanship, when, in fact, they were not, and were defective as alleged. Plaintiff did not answer any of these material allegations, and when defendant moved for judgment on the pleadings before the beginning of the trial on the ground that plaintiff did not answer any of the allegations relating to warranties and thereby confessed the same, the motion was overruled. Defendant's counterclaim contains allegations similar to those in its affidavit of defense. Plaintiff's answer to the counterclaim denies all of defendant's material allegations with respect to the defects and inadequacy of the relays sold and delivered to it; denies that defendant notified it of any defects or breach of warranty within a reasonable time; avers that its offer to take back any alleged damaged relays was a bona fide attempt on its part to adjust matters out of court; that under the law and statutes it was defendant's duty, within a reasonable time, to inspect the various shipments of relays and either to accept or reject them; and that the items of damage claimed by defendant were not contemplated by the parties in their original contract. In none of the pleadings does plaintiff deny the allegations with respect to the express and implied warranties and breach thereof alleged in defendant's affidavit of defense and counterclaim, and there can be little doubt that the claimed warranties were made by plaintiff. Its catalog, which was introduced in evidence, contains the following foreword: "To give you what you want, in the way you want is Guardian's fundamental principle. Relays as shown in the catalog are only a meager visualization of the many ingeniously engineered devices available, or on the drafting board. Consistent performance. Proven dependable service, product quality, trouble free." On page 5 of the catalogue appears the following guarantee: "Guardian controls are constructed ^{to} give efficient and reliable service with a minimum of maintenance, and are guaranteed against all defects in manufacture." These guarantees had undoubtedly been called

warranted its relays were of the best materials and workmanship, when, in fact, they were not, and were defective as alleged. Plaintiff did not answer any of these material allegations, and when defendant moved for judgment on the pleadings before the beginning of the trial on the ground that Plaintiff did not answer any of the allegations relating to warranties and thereby confessed the same, the motion was overruled. Defendant's counterclaim contains allegations similar to those in its affidavit of defense. Plaintiff's answer to the counterclaim denies all of defendant's material allegations with respect to the defects and inadequacy of the relays sold and delivered to it; denies that defendant notified it of any defects or breach of warranty within a reasonable time; avers that its offer to take back any alleged damaged relays was a bona fide attempt on its part to adjust matters out of court; that under the law and statutes it was defendant's duty, within a reasonable time, to inspect the various shipments of relays and either to accept or reject them; and that the items of damage claimed by defendant were not contemplated by the parties in their original contract. In none of the pleadings does plaintiff deny the allegations with respect to the express and implied warranties and breach thereof alleged in defendant's affidavit of defense and counterclaim, and there can be little doubt that the claimed warranties were made by plaintiff. Its catalog, which was introduced in evidence, contains the following foreword: "To give you what you want, in the way you want is Guardian's fundamental principle. Relays as shown in the catalog are only a mere illustration of the many ingeniously engineered devices available or on the drafting board. Consistent performance. Proven depend-able service, product quality, trouble free." On page 2 of the catalog appears the following guarantee: "Guardian controls are constructed to give efficient and reliable service with a minimum of maintenance, and are guaranteed against all defects in manufacture." These guarantees had undoubtedly been called

to defendant's attention, because Steere testified that when he first called at defendant's plant, "I took out a catalog, showed him we manufactured them, gave him an idea of what they looked like. *** Then we looked through the relays in the catalog and he selected one he felt would fill the bill." Moreover, the court, in its ruling on propositions of law, also found that the claimed warranties had been made by defendant, but held them to be inapplicable, presumably upon the theory that the transaction between the parties constituted a sale by sample. It therefore appears that plaintiff expressly warranted its goods, as shown by the evidence, admitted by the pleadings and found as a proposition of law by the court, and the testimony discloses beyond a rational doubt that these warranties and guarantees were not complied with.

The remedies for breach of warranty are prescribed in section 69 of the Sales Act, chapter 121-1/2, Illinois Revised Statutes 1941, which contains the following provisions: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election - (a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price. (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." Defendant claimed these rights in its defense and counterclaim, and was entitled to the remedy prescribed by the statute.

The theory upon which the case was decided, sale by sample, is not supported by the evidence. The newly designed machine was novel in its field and had not been marketed by any other manufacturer. It required a relay which would automatically indicate the required heat for waving, by means of green and red lights. Plaintiff held itself out, through statements in its catalogue and by means of advertising and oral representations, as being expert in designing and making relays of guaranteed quality and workability

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The remedies for breach of warranty are prescribed in section 9 of the Sales Act, chapter 121-1/2, Illinois Revised Statutes 1941, which contains the following provisions: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election - (a) Accept or keep the goods and set up against the seller, the breach of warranty by way of recoupment in diminution or extinction of the price. (b) Accept or keep the goods and maintain an action against the seller for damages for the breach of warranty." Defendant claimed these rights in its defense and counterclaim, and was entitled to the remedy prescribed by the statute.

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for various purposes, and its representation that it could make articles suitable for defendant's machine, with the operation of which it became thoroughly familiar, amounted to a warranty. The relays submitted and manufactured were defective and would not serve the purpose for which they were intended. It does not follow, from the fact that defendant installed them in its machines, that it inspected and approved them, or that the transaction constituted a sale by sample, because the evidence is clear that the defects were latent and could not be discovered until the machine had been in operation over a period of time. Whether the difficulties encountered in the overwhelming number of machines returned were due to defects in design or material, or both, is of secondary importance. The controlling circumstance is that the relays would not work, and the warranty, express or implied, of their fitness for the purpose intended was therefore breached. Plaintiff's contention that the merchandise was retained more than a reasonable time after an opportunity for inspection thereof had been afforded, is untenable, because the defects could be and were discovered only after a period of operation. By reason of the failure of the relays to accomplish the purpose for which they were made, plaintiff is forced to rely on the theory of sale by sample; it could not recover on any other. But in view of our conclusion that the transaction does not fall within that theory under the facts of the case, we think the judgment on plaintiff's statement of claim was erroneously entered.

Defendant's counterclaim for damages is based on the expense incurred in crating, reassembling, adjusting and transporting defective machines returned by its customers. As heretofore stated, defendant had developed its remote control waving machine late in 1938, and accelerated production thereof for the purpose of meeting its sales demands to March or April 1939.

In the interim efforts were made to perfect a suitable relay, but without success; nevertheless, defendant installed plaintiff's

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Defendant's counterclaim for damages is based on the expense incurred in creating, reassembling, testing and transporting defective machines returned by its customers. As heretofore stated, defendant had developed its remote control wiring machine late in 1936, and accelerated production thereof for the purpose of meeting its sales demands to March or April 1939. In the interim efforts were made to perfect a suitable relay, but without success; nevertheless, defendant installed plaintiff's

relays in many of its machines and sent them to its customers. Much of the difficulty resulted from haste in yielding to what plaintiff's counsel designate as "great sales pressure." The disclosure of the defects which caused so many machines to be returned by customers, could undoubtedly have been ascertained by a more leisurely process of testing and assembling in defendant's plant, and the return of so many machines was undoubtedly caused by hurried shipments made before the defects could be definitely discovered. Under the circumstances we think plaintiff should not be charged with the expense incurred in crating, reassembling and transporting the returned machines.

Accordingly, the judgment of the Municipal court with respect to plaintiff's claim is reversed, and since the cause was tried without a jury and no useful purpose would be served by remanding it for another trial, judgment is entered here for defendant and against plaintiff for costs; and as to defendant's counterclaim, the judgment of the Municipal court is affirmed.

JUDGMENT WITH RESPECT TO PLAINTIFF'S
CLAIM REVERSED AND JUDGMENT HERE FOR
DEFENDANT; JUDGMENT WITH RESPECT TO
DEFENDANT'S COUNTERCLAIM AFFIRMED,

Sullivan, P. J., and Scanlan, J., concur.

relays in many of its machines and sent them to its customers. Much of the difficulty resulted from haste in yielding to what plaintiff's counsel designate as "great sales pressure." The disclosure of the defects which caused so many machines to be returned by customers, could undoubtedly have been ascertained by a more leisurely process of testing and assembling in defendant's plant, and the return of so many machines was undoubtedly caused by hurried shipments made before the defects could be definitely discovered. Under the circumstances we think plaintiff should not be charged with the expense incurred in creating, reassembling and transporting the returned machines. Accordingly, the judgment of the Municipal Court with respect to plaintiff's claim is reversed, and since the cause was tried without a jury and no useful purpose would be served by remanding it for another trial, judgment is entered here for defendant and against plaintiff for costs; and as to defendant's counterclaim, the judgment of the Municipal Court is affirmed.

JUDGMENT WITH RESPECT TO PLAINTIFF'S CLAIM REVERSED AND JUDGMENT HERE FOR DEFENDANT; JUDGMENT WITH RESPECT TO DEFENDANT'S COUNTERCLAIM AFFIRMED.

Sullivan, P. J., and Scullian, J., concur.

42550

A. CAPELLI et al.,
Appellants,

v.

CHARLOTTE ALLBORG et al.,
Appellees.

319 I.A. 018
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the second appeal taken by plaintiffs from decrees entered against them in proceedings arising from the liquidation of the Englewood State Bank, which was closed by the auditor of public accounts June 22, 1932. Trupp v. Englewood State Bank, 307 Ill. App. 258, sets forth fully the facts, pleadings and issues involved in the first appeal. After the bank was closed, plaintiffs in this suit, together with Rose C. Trupp, filed a complaint in the Circuit court to enforce the constitutional liability of the shareholders of the bank. Various amendments were filed and the case proceeded to hearing under an amended and supplemental bill filed December 17, 1932 which asked the court inter alia to "ascertain" (1) who were the stockholders of the bank, not only at the date it closed but prior thereto, and (2) the extent of the liability of such stockholders respectively to creditors of the bank under section 6 of article XI of the state constitution. The National Republic Bancorporation was named defendant, along with numerous individual shareholders. The cause was put at issue and referred to a master. Pursuant to hearings had from time to time, the liability of various defendants was fixed or compromised on recommendation of the master, and decrees were entered accordingly. One of these decrees, entered December 28, 1934, found Bancorporation to be holder of 1890 shares of the Englewood Bank and fixed its liability as such at \$189,000; it also ascertained and fixed the liability of the individuals who were joined in that suit as defendants at the sums specified in the decree.

Under the eighth amendment filed April 23, 1937, about 28 months after the decree was entered, plaintiffs for the first time

A. CARPENTIER et al.,
Appellants,

v.

CHARLOTTE ALBORG et al.,
Appellees.

COOK COUNTY.

MR. JUSTICE BRIDGES DELIVERED THE OPINION OF THE COURT.

This is the second appeal taken by plaintiffs from decrees entered against them in proceedings arising from the liquidation of the Englewood State Bank, which was closed by the auditor of public accounts June 28, 1935. Tripp v. Englewood State Bank, 307 Ill. App. 258, sets forth fully the facts, pleadings and issues involved in the first appeal. After the bank was closed, plaintiffs in this suit, together with Rose C. Tripp, filed a complaint in the Circuit court to enforce the constitutional liability of the shareholders of the bank. Various amendments were filed and the case proceeded to hearing under an amended and supplemental bill filed December 17, 1935 which asked the court inter alia to "ascertain" (1) who were the stockholders of the bank, not only at the date it closed but prior thereto, and (2) the extent of the liability of such stockholders respectively to creditors of the bank under section 6 of article XI of the state constitution. The National Republic Bank Corporation was named defendant, along with numerous individual shareholders. The cause was put at issue and referred to a master. Pursuant to hearings had from time to time, the liability of various defendants was fixed or compromised on recommendation of the master, and decrees were entered accordingly. One of these decrees, entered December 28, 1934, found Bank Corporation to be holder of 1890 shares of the Englewood Bank and fixed its liability as such at \$189,000; it also ascertained and fixed the liability of the individuals who were joined in that suit as defendants at the sums specified in the decrees.

Under the eighth amendment filed April 23, 1937, about 28 months after the decree was entered, plaintiffs for the first time

sought to have a further and additional liability decreed against some 1250 parties who were stockholders of Bancorporation, on the ground that their stockholdings in that corporation warranted a finding that they were the real owners of shares in First Englewood State Bank. They alleged that the filing of the eighth amendment was "necessitated by facts coming to the knowledge of plaintiffs and their attorneys and events transpiring subsequent to the filing of the amended and supplemental bill of complaint." The events referred to were the filing of an involuntary petition in bankruptcy against Bancorporation in the District Court of the United States for the Northern District of Illinois and its adjudication of bankruptcy on May 16, 1933, which was some 18 months prior to the entry of the decree on December 28, 1934. With respect to these circumstances we said, in our former opinion, that "Obviously, the proceeding against the individual shareholders of Bancorporation, instituted long after the entry of the decree adjudicating Bancorporation to be the holder of 1,890 shares of capital stock of the Englewood Bank, was designed to hold the individual shareholders of Bancorporation liable for this indebtedness because the insolvency of Bancorporation indicated that no part of the \$189,000 judgment could be recovered from the corporation. It is noteworthy, however, that the pendency of the bankruptcy proceeding against Bancorporation was known to plaintiffs before the entry of the decree and the record of the bankruptcy court, including the books and accounts of Bancorporation, were open to inspection of plaintiffs and other creditors and afforded them the right of examination of all facts concerning its affairs."

Of the 1250 persons who were made parties to the eighth amendment, 51 were originally shareholders of the Englewood Bank who acquired Bancorporation stock through exchange of their original ownership of stock in the Englewood Bank. Their liability was adjudicated by one of the decrees entered in the stockholders' liability proceeding, and they were ordered to pay an assessment for the period during which they held Englewood Bank stock. The remaining

for the period during which they held Englewood stock. The remaining liability proceeding, and they were ordered to pay an assessment against Bank Bank. Their liability was ownership of stock in the Englewood Bank. The original amendment, 21 were originally shareholders of the Englewood Bank who Of the 1250 persons who were made parties to the eighth the right of examination of all facts concerning its affairs."

open to inspection of plaintiffs and other creditors and afforded them copy court, including the books and accounts of Bankruptcy, were plaintiffs before the entry of the decree and the record of the bankruptcy proceeding against Bankruptcy was known to from the corporation. It is noteworthy, however, that the bankruptcy indicated that no part of the \$189,000 judgment could be recovered liable for this indebtedness because the insolvency of Bankruptcy was designed to hold the individual shareholders of Bankruptcy the holder of 1,800 shares of capital stock of the Englewood Bank, long after the entry of the decree adjudicating Bankruptcy to be ing against the individual shareholders of Bankruptcy, instituted stances we said, in our former opinion, that "Obviously, the proceeding of the decree on December 28, 1934. With respect to these circumstances on May 16, 1933, which was some 18 months prior to the entry for the Northern District of Illinois and its adjudication of bankruptcy in the District Court of the United States against Bankruptcy were the filing of an involuntary petition in bankruptcy the amended and supplemental bill of complaint." The events referred to were the filing of an involuntary petition in bankruptcy their attorneys and events transpiring subsequent to the filing of "necessitated by facts coming to the knowledge of plaintiffs and State Bank. They alleged that the filing of the eighth amendment was finding that they were the real owners of shares in First Englewood ground that their stockholdings in that corporation warranted a some 1250 parties who were stockholders of Bankruptcy, on the sought to have a further and additional liability decreed against

defendants, about 1200 in number, were not originally shareholders of the Englewood Bank and were not made parties until more than two years after the entry of the decree December 28, 1934.

The theory upon which it was sought to impose liability against the 1250 shareholders was that by reason of their ownership of stock in Bancorporation, they were imputed to have had knowledge that that company was organized and operated, as alleged in the eighth amended complaint, for the fraudulent and illegal purposes of operating a general banking system, in violation of the Illinois statute, rendering all its acts and doings ultra vires; that the shareholders were to be regarded as partners, charged with knowledge of the facts; and that the owners and holders of shares of the capital stock of Bancorporation were the actual and beneficial holders and owners of 1890 shares of the capital stock of the Englewood Bank standing of record in the name of Bancorporation, which was intended as a mere agency or instrumentality for enabling the shareholders to operate, dominate and control the Englewood Bank, the capital stock of which was nominally held by Bancorporation.

The defendants in that proceeding filed various motions to dismiss the amended and supplemental complaint, upon the ground that the final decree, entered in that proceeding on December 28, 1934, determined and ascertained the stockholders of the Englewood Bank, which included Bancorporation as the holder of 1890 shares, and fixed their liabilities as such; that the action of plaintiffs in procuring a judgment against National Republic Bancorporation constituted an election by creditors of the First Englewood State Bank of Chicago to hold Bancorporation responsible for the liability imposed upon it; that they were therefore estopped from asserting liability against the defendants named in the amendments and supplements; that the decree of December 28, 1934 constituted an adjudication of the fact that Bancorporation and not defendants were the owners of the 1890 shares of Englewood Bank stock in question; and that the court was without jurisdiction or power, after the lapse of more

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than two years, to modify its decree so as to fix a further and additional liability against the individual stockholders of Bancorporation. The motions to dismiss the amendment and supplements were sustained, and a decree of dismissal was entered, from which an appeal was perfected by plaintiffs. On November 26, 1940 we affirmed the decree of the Circuit court in Trupp et al. v. First Englewood State Bank, supra, holding, among other things, that since a decree for stockholders' superadded liability had been entered against Bancorporation, plaintiffs could not later amend their complaint to charge individual stockholders with the liability, the term having expired, depriving the court of jurisdiction and power to reopen the case.

On December 10, 1941, more than nine years after the closing of the Englewood Bank and the filing of the original complaint in the Circuit court and without leave of that court, plaintiffs lodged the present complaint in the Superior court of Cook county, making substantially the same allegations as were set forth in the amendments which were dismissed for want of equity by the Circuit court in July 1938, and seeking the same relief. The complaint makes no reference to the former proceedings in the Circuit court, nor did plaintiffs seek to set aside the adjudications contained in the decree of that court. The motions of the several defendants to dismiss the complaint in the instant proceeding were sustained by the Superior court, the cause was dismissed for want of equity, and plaintiffs have taken an appeal from that decree.

Plaintiffs take the position that our former decision in Trupp v. Englewood State Bank, supra, was not res adjudicata as to their cause of action in this proceeding. Although our decision rested primarily on the lack of power or jurisdiction of the Circuit court to amend or modify its decree after two years, we also discussed and determined the finality of the decree with respect to the ownership of the stock as follows: "The decree of December 28, 1934, adjudicates the fact that Bancorporation was the owner of the stock in question, and orders it and other defendants named therein to pay to the receiver within

than two years, to modify its decree so as to fix a further and additional liability against the individual stockholders of Bancorporation. The motions to dismiss the amendment and supplements were sustained, and a decree of dismissal was entered, from which an appeal was perfected by plaintiffs. On November 26, 1940 we affirmed the decree of the Circuit court in Trupp et al. v. First English State Bank, Supra, holding, among other things, that since a decree for stockholders' superseded liability had been entered against Bancorporation, plaintiffs could not later amend their complaint to charge individual stockholders with the liability, the term having expired, depriving the court of jurisdiction and power to reopen the case.

On December 10, 1941, more than nine years after the closing of the English Bank and the filing of the original complaint in the Circuit court and without leave of that court, plaintiffs lodged the present complaint in the Superior court of Cook county, making substantially the same allegations as were set forth in the amendments which were dismissed for want of equity by the Circuit court in July 1938, and seeking the same relief. The complaint makes no reference to the former proceedings in the Circuit court, nor did plaintiffs seek to set aside the adjudications contained in the decree of that court. The motions of the several defendants to dismiss the complaint in the instant proceeding were sustained by the Superior court, the cause was dismissed for want of equity, and plaintiffs have taken an appeal from that decree.

Plaintiffs take the position that our former decision in Trupp v. English State Bank, Supra, was not res adjudicata as to their cause of action in this proceeding. Although our decision rested primarily on the lack of power or jurisdiction of the Circuit court to amend or modify its decree after two years, we also discussed and determined the finality of the decree with respect to the ownership of the stock as follows: "The decree of December 28, 1934, adjudicates the fact that Bancorporation was the owner of the stock in question, and orders it and other defendants named therein to pay to the receiver within

10 days from the date of the entry of the decree, the sums specified, 'in satisfaction of their respective constitutional superadded liabilities, as stockholders of said First Englewood State Bank of Chicago, upon those shares of stock held by them as hereinbefore and hereinafter set forth.' That adjudication had all the characteristics of a final decree, and it would manifestly be inconsistent for the court, more than two years later in the same proceeding, to adjudge that the individual shareholders of Bancorporation are the 'true owners of the stock.' *** The decree adjudicating Bancorporation to be the owner of 1,890 shares of stock of the Englewood Bank was procured by plaintiffs in a cause instituted by them. It was the decree they sought and obtained and we see no valid reason why they should be permitted, after the lapse of more than two years, to have it changed or supplemented so as to create a new liability against numerous individuals which would be inconsistent with the findings of the decree."

If we were sound in our conclusion that no valid reasons existed why plaintiffs should have been permitted, after the lapse of more than two years, to change or supplement the original decree in a direct action, it is difficult to conceive why plaintiffs, more than nine years after their original action was instituted and seven years after decree was entered, should be permitted to assert a new liability against numerous individuals, inconsistent with the findings of the decree in the former suit.

Plaintiffs' counsel argue, however, that both the record owner and the real owner of bank stock in Illinois may be held liable and decrees entered against them upon the same stock, although there can be but one satisfaction. They rely principally upon Anderson v. Atkinson, 22 Fed. Supp. 853. It seems to us to be a sufficient answer to this contention to revert to our former opinion, wherein we pointed out that the decree adjudicating Bancorporation to be the owner of 1890 shares of Englewood Bank stock, was procured by plaintiffs in a cause instituted by them and that it was the decree they

10 days from the date of the entry of the decree, the same applied, "in satisfaction of their respective constitutional and statutory liabilities, as stockholders of said First English State Bank of Chicago, upon those shares of stock held by them as shareholders and hereinafter set forth." That adjudication had all the characteristics of a final decree, and it would manifestly be inconsistent for the court, more than two years later in the same proceeding, to adjudicate that the individual shareholders of Bancorporation are the "true owners of the stock." *** The decree adjudicating Bancorporation to be the owner of 1,800 shares of stock of the English Bank was procured by plaintiffs in a cause instituted by them. It was the decree they sought and obtained and we see no valid reason why they should be permitted, after the lapse of more than two years, to have it changed or supplemented so as to create a new liability against numerous individuals which would be inconsistent with the findings of the decree."

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can be but one satisfaction. They rely principally upon Anderson v. Atkinson, 22 Fed. Supp. 872. It seems to us to be a sufficient answer to this contention to revert to our former opinion, wherein we pointed out that the decree adjudicating Bancorporation to be the owner of 1,800 shares of English Bank stock, was procured by plaintiffs in a cause instituted by them and that it was the decree they

sought and obtained. Having obtained that adjudication through their own initiative, they should not be permitted to obtain a decree against the numerous Bancorporation shareholders, which would be entirely inconsistent with the findings of the former decree. Anderson v. Atkinson, *supra*, the decision relied upon ^{by} plaintiffs, was one of a series of suits filed by Anderson, receiver of the National Bank of Kentucky, against the shareholders of Banco-Kentucky Company, which operated in that state. The principal suits were filed in the Federal courts of Kentucky. Anderson v. Atkinson was a separate proceeding filed against a number of shareholders who resided in this state. The district judge held that a suit in equity would lie against real owners of stock of an insolvent national bank, of which the stockholding company was the record owner, for accounting as to liability on the statutory assessment on stock. In the main jurisdiction filed by Anderson the Federal courts in the following decisions held that the shareholders of the holding companies were not liable. Anderson v. Abbott, 32 Fed. Supp. 328, affirmed in Anderson v. Abbott, 127 Fed. (2d) 696. Subsequently certiorari was granted by the Supreme Court of the United States from the decision reported in 127 Fed. (2d) 696, and the case was argued orally in the spring of 1943. After the court had the matter under advisement for some time, it requested further oral argument on its own motion and continued the cause to the October 1943 term of the court.

The decision of the district judge in Anderson v. Atkinson is predicated largely upon the holding in Continental National Bank & Trust Co. v. O'Neil, 82 Fed. (2d) 650, and counsel for defendants point out that the decision in the O'Neil case was based upon federal statutes providing for two separate causes of action. In Illinois, however, there is only one liability and that is fixed by the constitution against the shareholders. (Art. XI, sec. 6.) Moreover, as heretofore pointed out, the original suit at bar filed against the shareholders of Bancorporation, asked that the court "ascertain"

sought and obtained. Having obtained that objection through their own initiative, they should not be permitted to obtain a decree against the numerous noncorporate shareholders, which would be entirely inconsistent with the findings of the former by Anderson v. Atkinson, supra, the decision relied upon plain- tiffs, was one of a series of suits filed by Anderson, receiver of the National Bank of Kentucky, against the shareholders of Banco-Kentucky Company, which operated in that state. The principal suits were filed in the Federal courts of Kentucky. Anderson v. Atkinson was a separate proceeding filed against a number of shareholders who resided in this state. The district judge held that a suit in equity would lie against real owners of stock of an insolvent national bank, of which the stockholding company was the record owner, for accounting as to liability on the statutory assessment on stock. In the main, this decision filed by Anderson the Federal courts in the following decisions held that the shareholders of the holding companies were not liable. Anderson v. Abbott, 32 Fed. Supp. 328, affirmed in Anderson v. Abbott, 127 Fed. (2d) 896. Subsequently certiorari was granted by the Supreme Court of the United States from the decision reported in 127 Fed. (2d) 896, and the case was argued orally in the spring of 1943. After the court had the matter under advisement for some time, it requested further oral argument on its own motion and confirmed the cause to the October 1943 term of the court. The decision of the district judge in Anderson v. Atkinson is predicated largely upon the holding in Continental National Bank & Trust Co. v. O'Neil, 32 Fed. (2d) 870, and counsel for defendants point out that the decision in the O'Neil case was based upon Federal statutes providing for two separate causes of action. In Illinois, however, there is only one liability and that is fixed by the com- plication against the shareholders. (Art. XI, sec. 6.) Moreover, as heretofore pointed out, the original suit at bar filed against the shareholders of Bancorporation, asked that the court "ascertain"

the stockholders of the Englewood State Bank, and the decree of December 28, 1934 ascertained and determined that very fact. This, we think, constitutes an adjudication of the question then presented. If plaintiffs had originally sought to fix liability against ^{those} whom they designate to be the real owners of Bancorporation, instead of the corporation itself, a different question might have been presented, but that remedy is no longer open to them. Whatever may be the ultimate conclusion of the Supreme Court of the United States in Anderson v. Abbott, we think it will not affect the principle that after a court has ascertained and established, by its decree, the ownership of bank stock, such question cannot be relitigated in another suit, especially by the same parties who secured the former decree.

Accordingly, we are of opinion that the decree of the Superior court dismissing plaintiffs' complaint for want of equity is in accord with the law as laid down in our former opinion and should be affirmed. It is so ordered.

DECREE AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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Accordingly, we are of opinion that the decree of the Superior Court dismissing plaintiffs' complaint for want of equity is in accord with the law as laid down in our former opinion and should be affirmed. It is so ordered.

DOUGLAS WILLARD,

Sullivan, P. J., and Scamman, J., concur.

42575

IRVING BILTON,
Appellee,

v.

PURE PROTECTION INSURANCE
ASSOCIATION, a burial insurance
society incorporated under the
laws of the State of Illinois,
Appellant.

319 LA. 344
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in the sum of \$377.78 entered against it and in favor of plaintiff, the named beneficiary in a certificate of insurance issued by defendant on the life of Joseph Yuskowich.

The amended statement of claim alleged in substance that defendant, which is incorporated under the laws of Illinois for the purpose of issuing burial insurance, executed a policy on the life of Joseph Yuskowich on October 1, 1940, wherein it promised to pay plaintiff, as beneficiary, the sum of \$500, subject to the graded benefits, namely the sum of \$300 if death occurred between the twelfth and the eighteenth month, according to the terms of the policy; that the insured died January 31, 1942, between the twelfth and the eighteenth month succeeding the issuance of the policy and that death occurred while the policy was in full force and effect; that plaintiff was the lawful son of the insured and had promptly paid all premiums due on the policy upon receipt of premium notices, including the payment of one premium on February 1, 1942 for \$2.78, subsequent to his father's death, for which he claimed a refund; that plaintiff had performed all conditions precedent entitling him to the payment of the proceeds of the policy, according to its terms; that more than 60 days had elapsed since the filing of a formal proof of claim and death, and that defendant had failed within the time provided by statute to approve or disapprove the payment of the claim; and that defendant's refusal to make payment was vexatious and without

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COURT OF CHICAGO.

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benefits, namely the sum of \$300 if death occurred between the

twelfth and the eighteenth month, according to the terms of the
policy; that the insured died January 21, 1942, between the twelfth
and the eighteenth month succeeding the issuance of the policy and
that death occurred while the policy was in full force and effect;
that plaintiff was the lawful son of the insured and had promptly

paid all premiums due on the policy upon receipt of premium notices,
including the payment of one premium on February 1, 1942 for \$2.78,
subsequent to his father's death, for which he claimed a refund;

that plaintiff had performed all conditions precedent entitling him
to the payment of the proceeds of the policy, according to its terms;
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of claim and death, and that defendant had failed within the time

provided by statute to approve or disapprove the payment of the claim;
and that defendant's refusal to make payment was vexatious and without

reasonable cause, by reason whereof plaintiff was entitled to reasonable attorney's fees as part of the taxable costs.

The defense interposed admitted substantially all the essential allegations of the complaint, except that it was indebted to plaintiff, and averred by way of defense that there was a breach of conditions of the insurance policy because of the alleged misrepresentation by the insured as to his state of health prior to the issuance of the policy.

June 15, 1942 plaintiff made a motion that the affidavit of merits be stricken, that he be given leave to file his affidavit for summary judgment, and that judgment be entered against defendant instanter. The affidavit for summary judgment set forth the issuance of the policy, the provisions thereof, the death of the insured on January 31, 1942, the relationship between the insured and the beneficiary, alleged that all premiums on the policy had been promptly paid, including one in February 1942 for \$2.78, which became due after the death of insured, that all conditions precedent under the policy were performed according to its terms, and set forth the following provision of section 959, chap. 73, Illinois Revised Statutes, relating to burial insurance societies: "All claims filed with a society shall be approved or disapproved within sixty days after receipt of due proof of death and, if approved, shall be paid within thirty days after such approval." The affidavit further alleged that under section 767 of chapter 73, Illinois Revised Statutes, in actions filed against companies for refusal to pay upon demand, where it appears to the court that such refusal is vexatious and without reasonable cause, the court may allow reasonable attorney's fees. It alleged that on April 11, 1942, more than 60 days after the filing of formal proof of death, plaintiff by registered mail advised defendant that because of its failure to disapprove his claim within the time provided by statute the claim was then immediately due and payable, and because of defendant's

reasonable cause, by reason whereof plaintiff was entitled to reasonable attorney's fees as part of the taxable costs.

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June 12, 1942 plaintiff made a motion that the affidavit of merits be stricken, that he be given leave to file his affidavit for summary judgment, and that judgment be entered against defendant instantly. The affidavit for summary judgment set forth the issuance of the policy, the provisions thereof, the death of the insured on January 31, 1942, the relationship between the insured and the beneficiary, alleged that all premiums on the policy had been promptly paid, including one in February 1942 for \$2.78, which became due after the death of insured, that all conditions precedent under the policy were performed according to its terms, and set forth the following provision of section 939, chap. 73, Illinois Revised Statutes, relating to burial insurance societies: "All claims filed with a society shall be approved or disapproved within sixty days after receipt of due proof of death and, if approved, shall be paid within thirty days after such approval." The affidavit further alleged that under section 707 of chapter 73, Illinois Revised Statutes, in actions filed against companies for refusal to pay upon demand, where it appears to the court that such refusal is vexatious and without reasonable cause, the court may allow reasonable attorney's fees. It alleged that on April 11, 1942, more than 60 days after the filing of formal proof of death, plaintiff by registered mail advised defendant that because of its failure to disapprove his claim within the time provided by statute the claim was then immediately due and payable, and because of defendant's

willful refusal to pay the proceeds of the policy plaintiff had filed his suit and was entitled to reasonable attorney's fees.

On June 29, 1942 the court entered summary judgment on plaintiff's motion supported by the foregoing affidavit. Thereafter, on July 31, 1942, the parties stipulated that the judgment be vacated and set aside, and "that the plaintiff's affidavit for summary judgment be set for hearing upon a day certain to be fixed by the court." The hearing on plaintiff's motion for summary judgment was then continued by order of court from time to time until September 30, 1942, when the matter came on for hearing before the court without a jury. Plaintiff adduced evidence substantiating all the material allegations of his complaint, and when he rested, defendant's counsel cross-examined plaintiff at considerable length with respect to the health, hospitalization and medical attendance of the insured prior to the issuance of the policy. None of plaintiff's allegations or testimony was successfully refuted, and defendant offered no evidence whatsoever with respect to its defense that a breach of the condition of the policy had occurred because of the misrepresentation by the insured of his state of health prior to the issuance of the policy.

Defendant seeks to reverse the judgment on the sole ground that plaintiff's failure to file a replication to its sworn answer alleging affirmative defenses constituted an admission of all the facts pleaded therein, including averments of misrepresentation and concealment of material facts in the application for the policy with respect to the health of the insured. Its technical defense is utterly without merit. Defendant offered no evidence in support of the defense interposed. On trial its counsel took the position that the application for summary judgment had been stricken, but the record does not sustain that contention. It clearly appears that after plaintiff had obtained summary judgment on June 29, a stipulation was entered into between the parties setting aside the judgment and providing that

willful refusal to pay the proceeds of the policy plaintiff had filed his suit and was entitled to reasonable attorney's fees.

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"plaintiff's affidavit for summary judgment be set for hearing upon a day certain to be fixed by the court." That motion was continued from time to time until September 30, when the cause was heard, and upon the record the motion for summary judgment was then pending before the court. Under the affidavit presented, the plaintiff was clearly entitled to a judgment because it appears from the affidavit that on April 11, 1942, which was more than 60 days after the filing of formal proof of death, plaintiff demanded payment of the proceeds of the policy, and under section 959 of chap. 73, Illinois Revised Statutes, it was incumbent upon defendant to either approve or disapprove plaintiff's claim within 60 days after proof of death had been filed. Plaintiff's registered letter of April 11, addressed to defendant at its office in Chicago, was utterly ignored, and there is nothing in the record to indicate that defendant ever signified, in writing or otherwise, that it had approved or disapproved plaintiff's claim until after suit was instituted.

The contention that plaintiff failed to file a replication to defendant's sworn answer in accordance with rule 26 (2) and rule 35 (2) of the Municipal court is untenable. Plaintiff's motion and affidavit for summary judgment were on file when defendant interposed its affidavit of merits, and the averments of the affidavit of merits raised no new matters requiring a reply. Goldberg v. Great Eastern Casualty Co., 169 N. Y. Supp. 113. Moreover, by failing to object to the state of the pleadings, defendant waived a reply under rule 37 (3) of the Municipal court, and through participation in the trial of the cause by extended cross-examination of plaintiff with respect to matters averred in the affidavit of merits, also waived a reply. Meyer v. Hendrix, 311 Ill. App. 605.

Upon the whole record there is really nothing to consider. All premiums were paid before their due date. The defendant offered nothing to rebut plaintiff's testimony that the decedent was in good health, nor did it produce any evidence to show a breach of warranty in the application for insurance. It failed to reject plaintiff's

in the application for insurance. It failed to reject plaintiff's health, nor did it produce any evidence to show a breach of warranty nothing to rebut plaintiff's testimony that the decedent was in good All premiums were paid before their due date. The defendant offered Upon the whole record there is really nothing to consider. Neyer v. Hendrix, 311 Ill. App. 605.

to matters averred in the affidavit of merits, also waived a reply of the cause by extended cross-examination of plaintiff with respect 37 (3) of the Municipal court, and through participation in the trial to the state of the pleadings, defendant waived a reply under rule Casarety Co., 169 N. Y. Supp. 113. Moreover, by failing to object raised no new matters requiring a reply. Goldberg v. Great Eastern affidavit of merits, and the averments of the affidavit of merits deavit for summary judgment were on file when defendant interposed its (2) of the Municipal court is untenable. Plaintiff's motion and affidavit defendant's sworn answer in accordance with rule 26 (2) and rule 37 The contention that plaintiff failed to file a replication to plaintiff's claim until after suit was instituted.

affirmed, in writing or otherwise, that it had approved or disapproved and there is nothing in the record to indicate that defendant ever addressed to defendant at its office in Chicago, was utterly ignored, death had been filed. Plaintiff's registered letter of April 11, approve or disapprove plaintiff's claim within 60 days after proof of Illinois Revised Statutes, it was incumbent upon defendant to either of the proceeds of the policy, and under section 999 of chap. 73, after the filing of formal proof of death, plaintiff demanded payment the affidavit that on April 11, 1942, which was more than 60 days plaintiff was clearly entitled to a judgment because it appears from then pending before the court. Under the affidavit presented, the was heard, and upon the record the motion for summary judgment was continued from time to time until September 30, when the cause upon a day certain to be fixed by the court." That motion was plaintiff's affidavit for summary judgment be set for hearing

claim within the 60 days provided by the statute, did not offer the return of the premiums and even retained the one premium which had been paid after the decedent's death. No satisfactory explanation is made for delay in paying the claim, and plaintiff was therefore entitled to attorney's fees, which the court fixed at \$75 after hearing evidence of the extent and character of services rendered.

We perceive no reason why the judgment of the Municipal court should not be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

claim within the 60 days provided by the statute, did not offer the return of the premiums and even retained the one premium which had been paid after the decedent's death. No satisfactory explanation is made for delay in paying the claim, and plaintiff was therefore entitled to attorney's fees, which the court fixed at \$75 after hearing evidence of the extent and character of

services rendered. We perceive no reason why the judgment of the Municipal court should not be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Sullivan, P. J., and Scannell, J., concur.

42069

ELAINE HOGMIRE,
Appellant,

v.

DR. JOSEPH VOITA,
Appellee.

318 I.A. 414
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action against defendant to recover damages for alleged negligence in extracting a tooth of plaintiff. After plaintiff rested her case the trial court, upon motion of defendant, directed the jury to find defendant not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The law that governs the court in passing upon a motion of defendant to direct a verdict is well settled.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296-7.)' (Mahan v. Richardson, 284 Ill. App. 493, 495. See, also, Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Wolever v. Curtiss Candy Co., 293 Ill. App. 586, 597.)" (Rose v. City of Chicago, 317 Ill. App. 1. Petition for leave to appeal denied by Supreme court, Ill. App.)

42069

MR. JUSTICE REAGAN DELIVERED THE OPINION OF THE COURT.
v.
DR. JOSEPH VOITA
Appellee.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

An action against defendant to recover damages for alleged negligence in extracting a tooth of plaintiff. After plaintiff rested her case the trial court, upon motion of defendant, directed the jury to find defendant not guilty. Plaintiff appeals from a judgment entered upon the verdict.
The law that governs the court in passing upon a motion of defendant to direct a verdict is well settled.

"A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, -- we can look only at that which is favorable to appellant. Yes v. Yes, 255 Ill. 414; McGinn v. Reynolds, 288 Ill. 188; Ilford v. Rush, 273 Ill. 489." (Hunter v. Trump, 315 Ill. 233, 236-7.)
(Mahan v. Richardson, 284 Ill. App. 493, 497. See, also, Thompson v. Chicago Motor Coach Co., 292 Ill. App. 104, 110; Molaver v. Curtiss Candy Co., 293 Ill. App. 286, 287.) (Ross v. City of Chicago, 317 Ill. App. 1. Petition for leave to appeal denied by Supreme Court, Ill. App.)

Defendant, a dentist, has an office in Oak Park and on August 11, 1939, in the forenoon, plaintiff called there, but as the doctor had a patient then in the chair he asked her to return around 5:30 p.m., which she did. Plaintiff testified that the doctor then "looked at the tooth and looked at the gums and tapped the tooth or the gums to see if it was sore, and it was, the gum was very sore, and I asked him if he would suggest pulling it, I said, 'I want to go out of town,' and asked him if he would pull it today and I said I did not want it pulled until Monday, I did not want to spoil my week end. He said, no, that he would pull it today;" that "I told him I had a toothache for three or four days, I was miserable with it and wanted it taken care of;" that "my jaw was slightly swollen, of course, I didn't look at my gums, of course, but they were sore to the extent that I did not know which tooth hurt;" that the doctor extracted the tooth, after which she felt better; that she went home and went to bed; that the next day, Saturday, she worked, after which she and her husband drove to Benton Harbor, Michigan, arriving there about 11 p.m.; that during the evening she was comfortable; that on Sunday she felt very good; that they returned to Chicago about noon, Monday; that on the way home her tooth ached and she took an aspirin to see if it would relieve the pain; that when she reached home she "continued taking some more aspirin and went to bed;" that the aspirin relieved the pain considerably for a short time; that Monday night she got up several times and took aspirin; that on Tuesday morning the pain was getting more intense and she called the office of defendant and was told that he was out of town but that she should come to the office and somebody would take care of her; that on Tuesday she went to defendant's office and Dr. Crawshaw "put medication in it and packed it;" that Dr. Crawshaw told her that she had a dry socket, that "all he had to do was pack it until it would heal

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from the bottom;" that later the same day Dr. Crawshaw repeated his former treatment, which relieved her for an hour or two; that on Tuesday^{night}, "the treatment started to work off and the thing started all over again;" that she went to defendant's office thereafter a number of times and upon each occasion Dr. Crawshaw followed the same treatment; that she told Dr. Crawshaw she could not sleep and he gave her some pills to enable her to get some rest; that on August 24 Dr. Carey was called in; that she was then quite ill and more or less delirious; that her "cheek was swollen and it was more sore than it was swollen, it was very tender to the touch and sore through the entire area and I was quite dizzy, of course, and very ill, I had severe headaches;" that Dr. Carey "gave me some sulfanilamide tablets, he said an infection had gotten into my blood stream and told my sister to put on hot applications and change them every fifteen minutes without delay because it was very necessary that that be done;" that from that time until she went to the hospital on September 6 her husband and her sister applied hot, wet applications day and night; that she was in bed during all of that time; that at the hospital they took X-rays and gave her X-ray treatments and shots for the infection in the blood stream, and put hot packs and a heating pad on her jaw; that she remained in the hospital the first time for sixteen days; that during that time her temperature was quite high and she had severe pain and headaches all the time; that something burst "in my jaw, right in the cheek," "inside of the mouth and throat;" that during her stay at the hospital she had to rest with her head raised over the pillow, "so it would drain out instead of run into my stomach;" that on September 22 she left the hospital, was taken home and put to bed; that thereafter she received "the same treatment as I had received at the hospital with the hot and wet applications and heating pad;" that Dr. Haller, a dentist, treated her at home; that "he sprayed out or sponged out the socket and cleaned that socket out with medication and said it was in-

from the bottom," that later the same day Dr. Crawshaw requested his former treatment, which relieved her for an hour or two; that on Tuesday night the treatment started to work off and the thing started all over again; that she went to defendant's office thereafter a number of times and upon each occasion Dr. Crawshaw followed the same treatment; that she told Dr. Crawshaw she could not sleep and he gave her some pills to enable her to get some rest; that on August 24 Dr. Carey was called in; that she was then quite ill and more or less delirious; that her "cheek" was swollen and it was more sore than it was swollen, it was very tender to the touch and sore through the entire area and I was quite dizzy, of course, and very ill, I had severe headaches; that Dr. Carey "gave me some salicylismide tablets, he said an infection had gotten into my blood stream and told my sister to put on hot applications and change them every fifteen minutes without delay because it was very necessary that that be done;" that from that time until she went to the hospital on September 6 her husband and her sister applied hot, wet applications day and night; that she was in bed during all of that time; that at the hospital they took X-rays and gave her X-ray treatments and shots for the infection in the blood stream, and put hot packs and a heating pad on her jaw; that she remained in the hospital the first time for sixteen days; that during that time her temperature was quite high and she had severe pain and headaches all the time; that something burst "in my jaw, right in the cheek," "inside of the mouth and throat;" that during her stay at the hospital she had to rest with her head raised over the pillow, "so it would drain out instead of run into my stomach;" that on September 22 she left the hospital, was taken home and put to bed; that thereafter she received "the same treatment as I had received at the hospital with the hot and wet applications and heating pad;" that Dr. Hallon, a dentist, treated her at home; that "he sprayed out or sponged out the socket and cleaned that socket out with medication and said it was in-

fectcd;" that she remained in bed for about a month after she returned home; that "the side of the face in the temporal region is very hard and swollen," and that it became progressively worse from time to time; that about October 16 she went back to the hospital, where she was treated by Dr. Fouser; that "he operated or cut the side of my face to drain;" that a drain was put in that part and after she went back to her home Dr. Carey treated her every day; that he took the drain out "and has been putting the smaller drain in at times until that was completely drained;" that after she arrived home a pus pocket formed in her mouth and Dr. Carey opened it and let it drain; that the surgical operation left a depression on the left side of her face and she is unable to open her mouth as far as she could prior to the extraction of the tooth; that she experiences a clicking or grating sound when she attempts to open her mouth; that excess scar tissue made a bad protrusion and Dr. Carey performed an operation of burning off the excess scar tissue.

Dr. Clair M. Carey, a physician and dentist, testified that he saw plaintiff on August 24 and found "profound swelling over the left side of her face;" that she appeared toxic and had difficulty in opening her mouth; that her temperature was 104; that he prescribed sulfanilamide and hot dressings; that he saw her every day until the middle of November; that she was quite ill; that for about two or three weeks he saw her two to four times a day; that his diagnosis was infectious cellulitis and he recommended that a specialist be called, and Dr. Fouser was called into the case; that plaintiff was hospitalized September 6; that she was in great pain, confined to bed and unable to leave it for any purpose; that she developed an abscess of the left subtonsilar area within the throat and mouth and he opened it and drained out an ounce of foul-smelling pus; that he reopened it every morning for two or three days; that she was unable to take any solid foods; that she left the hospital September 22, 1939, and the hot, wet dressings were continued at

tested; that she remained in bed for about a month after she returned home; that the side of the face in the temporal region is very hard and swollen, and that it became progressively worse from time to time; that about October 10 she went back to the hospital, where she was treated by Dr. Fowser; that "he operated on the side of my face to drain;" that a drain was put in that part and after she went back to her home Dr. Carey treated her every day; that he took the drain out "and has been putting the smaller drain in at times until that was completely drained;" that after she arrived home a pus pocket formed in her mouth and Dr. Carey opened it and let it drain; that the surgical operation left a depression on the left side of her face and she is unable to open her mouth as far as she could prior to the extraction of the tooth; that she experiences a clicking or grating sound when she attempts to open her mouth; that excess scar tissue made a bad protrusion and Dr. Carey performed an operation of burning off the excess scar tissue. Dr. Clair M. Carey, a physician and dentist, testified that he saw plaintiff on August 24 and found "profound swelling over the left side of her face;" that she appeared toxic and had difficulty in opening her mouth; that her temperature was 104; that he prescribed sulfanilamide and hot dressings; that he saw her very day until the middle of November; that she was quite ill; that for about two or three weeks he saw her two to four times a day; that his diagnosis was infectious cellulitis and he recommended that a specialist be called, and Dr. Fowser was called into the case; that plaintiff was hospitalized September 6; that she was in great pain, confined to bed and unable to leave it for any purpose; that she developed an abscess of the left submental area within the throat and mouth and he opened it and drained out an ounce of foul-smelling pus; that he reopened it every morning for two or three days; that she was unable to take any solid foods; that she left the hospital September 22, 1939, and the hot, wet dressings were continued at

her home; that on October 16, 1939, she returned to the hospital and an operation was performed on her by Dr. Fouser on the external side of the left cheek, right under the angle of the jaw; that it was necessary to insert a fresh drain every day for about two or three weeks; that after the drainage stopped it started to heal but an excess amount of granulation tissue formed, which required cauterization; that a scar three-quarters of an inch long formed from the operation at the angle of the jaw and there is a physical difference between the left and right side of her face; that she has a slight limitation of motion to the opening of her mouth due to the infection that she had; that this limitation will be permanent; that "she cannot yawn like you or I can. When she does yawn you can definitely hear a click and hear the bone. This is involuntary. When she wants to open her mouth to a certain degree, it will stop and go right back;" that he saw plaintiff about 150 times.

Dr. Joseph J. Haller, a dentist, testified that he examined plaintiff at her home on August 24, 1939; that he advised calling the family physician; that plaintiff showed quite a bit of infection around the area where the tooth was extracted; that "we call that a dry socket. *** A dry socket is inflammation of bone or bone and its membrane, due to infection. Dry socket and osteomyelitis are synonymous. Osteomyelitis is inflammation of the bone."

Dr. Fouser testified that when he saw plaintiff, in August, 1939, "she was suffering from an extensive inflammation of the jaw, the structures of the throat on the left side; considerable difficulty in swallowing; very high fever at the time and in very poor general physical condition from this involvement of the jaw, throat and neck region and face;" that he gave her sulfanilamide preparation for combating the infection; also gave irrigations of the mouth and throat, hot applications, heat externally, and "codeine for excessive pain in a hypo;" that on October 19 he performed an operation on her face "for the relief of an abscess of the parotid gland, in

her home; that on October 16, 1939, she returned to the hospital and an operation was performed on her by Dr. Fowser on the external side of the left cheek, right under the angle of the jaw; that it was necessary to insert a fresh drain every day for about two or three weeks; that after the drainage stopped it started to heal but an excess amount of granulation tissue formed, which required cauterization; that a scar three-quarters of an inch long formed from the operation at the angle of the jaw and there is a physical difference between the left and right side of her face; that she has a slight limitation of motion to the opening of her mouth due to the infection that she had; that this limitation will be permanent; that "she cannot yawn like you or I can. When she does yawn you can definitely hear a click and hear the bone. This is involuntary. When she wants to open her mouth to a certain degree, it will stop and go right back;" that he saw plaintiff about 150 times. Dr. Joseph J. Haller, a dentist, testified that he examined plaintiff at her home on August 24, 1939; that he advised calling the family physician; that plaintiff showed quite a bit of infection around the area where the tooth was extracted; that "we call that a dry socket. *** A dry socket is inflammation of bone or bone and its membrane, due to infection. Dry socket and osteomyelitis are synonymous. Osteomyelitis is inflammation of the bone." Dr. Fowser testified that when he saw plaintiff, in August, 1939, "she was suffering from an extensive inflammation of the jaw, the structures of the throat on the left side; considerable difficulty in swallowing; very high fever at the time and in very poor general physical condition from this involvement of the jaw, throat and neck region and face;" that he gave her sulfanilamide preparation for combating the infection; also gave irrigations of the mouth and throat, hot applications, heat externally, and "codaine for excessive pain in a hypo;" that on October 19 he performed an operation on her face "for the relief of an abscess of the parotid gland, in

that parotid gland area," at the West Suburban hospital; that an "incision was made on the left side of the face in the region of the angle of the mandible or the lower jaw;" that upon looking at plaintiff in court he finds that "there is more of a depression on the left side in the region where the operative work was carried on, than what there is on the opposite side of the face." The doctor answered a long hypothetical question, which we will refer to later.

Plaintiff called defendant as her witness under section 60 of the Practice Act. He testified that plaintiff appeared at his office about 9:30 a.m. on the day in question; that he examined her mouth but did not then pull the tooth; that an appointment was made for her for 5:30 p.m. and at that time he pulled the upper third left molar; that he examined the mouth to find out where the anesthesia could be produced, swabbed the areas which were to be punctured with the needle with iodine and inserted about one-half a CC of novocaine in front of the tooth on the cheek side and about one-fourth a CC on the tongue side; that he did not touch or pierce the periosteum in inserting the needle; that he had an X-ray machine in his office in good working order but he did not take an X-ray picture of plaintiff; that the length of the needle that he used was about one and one-quarter inches; that he used forceps to extract the tooth and a short elevator to test the extent of the anesthesia to be sure there would be no pain involved during the extraction, and that he found there was ample anesthesia; that plaintiff suffered no pain as he proceeded with the extraction; that she was not "pretty sick" when he saw her on August 28 at her home but that she was pretty sick when he saw her at the hospital; that "she was supposed to be suffering from a peritonsillar abscess, a swelling of the face;" that when he returned from his vacation two weeks later he saw plaintiff at her home and she did not seem to be suffering, she seemed to be well on her way to recovery, and that,

that parotid gland area," at the West Suburban hospital; that an incision was made on the left side of the face in the region of the angle of the mandible or the lower jaw; that upon looking at plaintiff in court he finds that "there is more of a depression on the left side in the region where the operative work was carried on, than what there is on the opposite side of the face." The doctor answered a long hypothetical question, which we will refer to later. Plaintiff called defendant as her witness under section 50

of the Practice Act. He testified that plaintiff appeared at his office about 9:30 a.m. on the day in question; that he examined her mouth but did not then pull the tooth; that an appointment was made for her for 5:30 p.m. and at that time he pulled the upper third left molar; that he examined the mouth to find out where the anesthesia could be produced, swabbed the areas which were to be punctured

with the needle with iodine and inserted about one-half a CC of novocaine in front of the tooth on the cheek side and about one-fourth a CC on the tongue side; that he did not touch or pierce the periosteum in inserting the needle; that he had an X-ray machine in his office in good working order but he did not take an X-ray picture of plaintiff; that the length of the needle that he used was about one and one-quarter inches; that he used forceps to extract the tooth and a short elevator to test the extent of the anesthesia to be sure there would be no pain involved during the

extraction, and that he found there was ample anesthesia; that plaintiff suffered no pain as he proceeded with the extraction; that she was not "pretty sick" when he saw her on August 28 at her home but that she was pretty sick when he saw her at the hospital; that "she was supposed to be suffering from a parotid gland abscess, a swelling of the face;" that when he returned from his vacation two weeks later he saw plaintiff at her home and she did not seem to be suffering, she seemed to be well on her way to recovery, and that

accordingly, he went away again the following evening for another week's vacation, as "she was in good spirits and feeling good, fairly well considering the way she was previously;" that osteomyelitis is not synonymous with dry socket and that they are not the same thing; that plaintiff appeared normal so far as he could ascertain when she came to his office on August 11, that she appeared to be in the best of health, with the exception of the tooth trouble. The doctor admitted that on February 28, 1940, he testified as follows: "Well, my opinion, of course, is not considering to be anything expert or authentic, but my personal opinion is Mrs. Hognire I knew to be not in the best of health for sometime. She had been working hard, put in long hours and she also had - she was under mental stress due to the ill health of her child, a daughter who had been in a cast for several months, and had just gotten on to crutches and I knew that was on her mind constantly and along with her work and all she was just - well, under par, and it is my personal opinion that because of her run-down condition, she had no resistance at all and the least little thing probably would up-set her." The doctor further testified that notwithstanding the fact that plaintiff was in a run down condition he injected novocaine and extracted the tooth; that in inserting the needle he did not touch or pierce the periosteum, which is the outer covering of the bone; that after the tooth was pulled he gave plaintiff instructions to apply cold, moist applications for an hour and a half to two hours, and not to wash her mouth out for at least three hours; that after three hours to wash her mouth out with a warm salt solution or mouth wash of her preference, and to keep it comfortably warm; that he told her he was leaving town and in case there was any question as to how the socket was healing or behaving or anything she did not understand to be sure and return to the office, because there were three other men in the suite with him and there was always somebody there to take care of her; that he returned two weeks later and learned Dr. Crawshaw had treated her during his absence, and further learned that she was suffering from a dry socket; that he

Accordingly, we went away again the following evening for another week's vacation, as "she was in good spirits and feeling good, fairly well considering the way she was physically," that satisfaction is not synonymous with dry socket and that they are not the same thing; that plaintiff appeared normal so far as he could ascertain when she came to his office on August 11, that she appeared to be in the best of health, with the exception of the tooth trouble. The doctor admitted that on February 26, 1940, he testified as follows: "Well, my opinion, of course, is not considering to be anything expert or authentic, but my personal opinion is Mrs. Hognate I knew to be not in the best of health for sometime. She had been working hard, but in long hours and she also had - she was under mental stress due to the ill health of her child, a daughter who had been in a cast for several months, and had just gotten on to crutches and I knew that was on her mind constantly and along with her work and all she was just - well, under par, and if it is my personal opinion that because of her run-down condition, she had no resistance at all and the least little thing probably would upset her." The doctor further testified that notwithstanding the fact that plaintiff was in a run down condition he injected novocaine and extracted the tooth; that in inserting the needle he did not touch or pierce the pericardium, which is the outer covering of the bone; that after the tooth was pulled he gave plaintiff instructions to apply cold, moist applications for an hour and a half to two hours, and not to wash her mouth out for at least three hours; that after three hours to wash her mouth out with a warm salt solution or mouth wash of her preference, and to keep it comfortably warm; that he told her he was leaving town and in case there was any question as to how the socket was feeling or behaving or anything she did not understand to be same and return to the office, because there were three other men in the suite with him and there was always somebody there to take care of her; that he returned two weeks later and learned Dr. Crawshaw had treated her during his absence, and further learned that she was suffering from a dry socket; that he

called on plaintiff at her home on the Monday that he returned to Chicago and also saw her when she was at the hospital; that she was then pretty sick.

The trial court directed a verdict for defendant upon the assumption that plaintiff failed to show by any doctor or dentist that defendant in and about the extraction of the tooth was negligent or unskillful. Counsel for plaintiff concedes that "in a malpractice case, it must be shown, first, that the defendant was unskillful and negligent, and second, that his want of skill and care caused injury to the plaintiff," but he contends that "to say that the only way we can show improper treatment in a malpractice case such as in the case at bar, is by a hypothetical question presented to a doctor, manifestly, is to give the law a very strict, narrow and overtechnical interpretation. Many of us may recall at one time or another that when we visited a dentist with a swollen jaw, or a slightly swollen jaw, he would not undertake immediately to extract the tooth by means of inserting a hypodermic needle with novocaine in the gum tissue but would advise us to wait until the swelling subsided and return at such time so that it may be extracted with safety. It certainly does not require medical skill for the laity to know that to insert a hypodermic needle with novocaine in an already infected area, would be dangerous, for by so doing, the infection would spread. The law cannot, to survive, be stagnant. It cannot be a dead thing. It must progress as civilization progresses. It must be kept abreast of the other arts and sciences in order to justify its existence."

In answer to plaintiff's contention defendant contends that before plaintiff could recover she must show by affirmative proof negligence or want of skill on the part of defendant and that such proof can only be established by the testimony of persons skilled in the profession. The law that bears upon the instant contention raised by plaintiff is settled, and adversely to plaintiff's position.

In Krueger v. Chase, 177 N. W. (Wis.) 510, suit was brought to recover against a dentist because of alleged malpractice, and the

called on plaintiff at her home on the Monday that he returned to Chicago and also saw her when she was at the hospital; that she was then pretty sick.

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In answer to plaintiff's contention defendant contends that before plaintiff could recover she must show by affirmative proof negligence or want of skill on the part of defendant and that such proof can only be established by the testimony of persons skilled in the profession. The law that bears upon the instant contention raised by plaintiff is settled, and adversely to plaintiff's position in Krueger v. Chase, 177 N. W. (Wis.) 210, suit was brought to recover against a dentist because of alleged malpractice, and the

Supreme court of Wisconsin said (p. 512): "It is easy for one to be wise in fields of activity other than those with which he is most familiar, and to erect standards of care that may be wholly inapplicable. What constitutes ordinary care in a case such as this is to be determined by the testimony of those who know what it is, and not as a matter of common knowledge. McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870." (Italics ours.)

One of the leading cases in malpractice suits is Ewing v. Goode, 78 Fed. 442, in which the opinion was rendered by the late Chief Justice Taft while he was sitting in the United States Circuit Court of Appeals. There the plaintiff sued to recover damages on account of alleged improper treatment of her eyes, claiming that owing to lack of proper care and skill on the part of the defendant she was caused to lose the sight of one of her eyes and part of the sight of the other eye. In holding that there could be no recovery Mr. Justice Taft said (p. 443):

"Before the plaintiff can recover, she must show by affirmative evidence - first, that defendant was unskillful or negligent; and, second, that his want of skill or care caused injury to the plaintiff. If either element is lacking in her proof, she has presented no case for the consideration of the jury. The naked facts that defendant performed operations upon her eye, and that pain followed, and that subsequently the eye was in such a bad condition that it had to be extracted, establish neither the neglect and unskillfulness of the treatment, nor the causal connection between it and the unfortunate event. A physician is not a warrantor of cures. If the maxim, 'Res ipsa loquitur,' were applicable to a case like this, and a failure to cure were held to be evidence, however slight, of negligence on the part of the physician or surgeon causing the bad result, few would be courageous enough to practice the healing art, for they would have to assume financial liability for nearly all the 'ills that flesh is heir to.'"

In discussing the necessity of expert evidence Mr. Justice

Supreme Court of Wisconsin said (p. 312): "It is easy for one to be wise in fields of activity other than those with which he is most

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Taft said (p. 444): "There can be no other guide, and, where want of skill or attention is not thus shown by expert evidence applied to the facts, there is no evidence of it proper to be submitted to the jury."

In Moline v. Christie, 180 Ill. App. 334, plaintiff brought suit to recover damages because of alleged malpractice. There the court said (p. 338):

"The law seems to be well settled that the mere fact that a good result is not obtained in the cure of a wound is of itself no evidence of negligence or lack of care, but there must be affirmative proof of such negligence or lack of care, and that the injuries complained of resulted therefrom. It seems also to be settled by the authorities that such proof can only be established by the testimony of experts skilled in the medical and surgical profession."

In Phebus v. Mather, 181 Ill. App. 274, and Wallace v. Yudelson, 244 Ill. App. 320, 326, 327, the rule laid down in Moline v. Christie was followed. In the Wallace case numerous authorities are cited in support of the rule.

In Bollenbach v. Bloomenthal, 341 Ill. 539, which was a case brought against a dentist to recover because of alleged malpractice, the court said (p. 546): "No case had been cited where the doctrine of res ipsa loquitur has been applied by this court as an aid to recovery in a malpractice suit. In Tefft v. Wilcox, 6 Kan. 46, it was held that the question of negligence or lack of skill in a surgical operation is one of science, to be determined by the testimony of skillful surgeons. Likewise, Pettigrew v. Lewis, 46 Kan. 78, holds that 'the mere fact that plaintiff's eyes have been weak and sore since the operation was performed does not prove negligence in the defendants nor establish a liability against them. To maintain her action the plaintiff should have offered evidence of skilled witnesses to show that the present condition of her eyes

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was the result of the operation and that it was unskillfully and negligently performed. This evidence must, from the very nature of the case, come from experts."

In Johnson v. Powell, 123 Pac. (Kan.) 881, which was an action to recover damages for alleged malpractice, the court said (p. 883): "Nonexpert witnesses could testify as to external appearances and manifest conditions observable by any one; but whether a surgical operation has been performed with a reasonable degree of skill, learning, and care, such as is ordinarily possessed and exercised by surgeons and physicians in the treatment of their patients, is a question of science, and is to be established by the testimony of surgeons and physicians having special skill and knowledge, and not by unskilled witnesses, who are without training or knowledge as to the injuries sustained, or the art of treating them. Tefft v. Wilcox, 6 Kan. 46; Pettigrew v. Lewis, 46 Kan. 78, 81, 82, 26 Pac. 458, 459." Many other cases supporting the rule might be cited.

In Shutan v. Bloomenthal, 371 Ill. 244, cited by plaintiff, the evidence showed that the defendant in extracting the plaintiff's tooth completely fractured the plaintiff's jaw and there was expert evidence tending to show that the usual and accepted treatment for such a condition was neither given nor prescribed by the defendant.

In Hall v. Grosvenor, 267 Ill. App. 119, the defendant, a physician, performed a Caesarean operation upon the plaintiff, "and upon its completion sewed up the incision, leaving a laparotomy sponge in the abdomen. Plaintiff thereafter suffered many painful symptoms. On November first following she had a bowel evacuation and expelled from her rectum the sponge, which is approximately 18 inches long, 6 inches wide and 1/4 inch thick. After this she made a rapid recovery." In the trial court, at the conclusion of plaintiff's case, upon motion of the defendant, the jury were instructed to find the defendant not guilty. The trial court granted the motion

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In Shuter v. Bloomenthal, 371 Ill. 244, cited by plaintiff, the evidence showed that the defendant in extracting the plaintiff's tooth completely fractured the plaintiff's jaw and there was expert evidence tending to show that the usual and accepted treatment for such a condition was neither given nor prescribed by the defendant. In Hall v. Grovesnor, 267 Ill. App. 119, the defendant, a physician, performed a Caesarean operation upon the plaintiff, and upon its completion sewed up the incision, leaving a laparotomy sponge in the abdomen. Plaintiff thereafter suffered many painful symptoms. On November first following she had a bowel evacuation and expelled from her rectum the sponge, which is approximately 18 inches long, 6 inches wide and 1/4 inch thick. After this she made a rapid recovery." In the trial court, at the conclusion of plaintiff's case, upon motion of the defendant, the jury were instructed to find the defendant not guilty. The trial court granted the motion

upon the claim made by the defendant's counsel (who represents the defendant in the instant case) that the sponge that was left in the body of the plaintiff after the operation created no presumption of negligence or want of skill on the part of the defendant. The First Division of this court held that "it would seem to be self-evident that the failure to remove the sponge, standing alone and unexplained, is prima facie evidence of negligence," and reversed the judgment and remanded the cause for a new trial. However, it appears from the record in that case that Dr. Heaney testified that under ordinary conditions there would be no medical reason for leaving in the abdomen a laparotomy sponge of the size of the one left in plaintiff's abdomen.

We hold that there is no merit in the instant contention of plaintiff.

Plaintiff next contends that even though we hold that the burden was upon her to prove by expert testimony that defendant was negligent or unskilful in his treatment of her, we must further hold that plaintiff has successfully borne the burden imposed upon her, and in support of this contention plaintiff relies upon the answer made by Dr. Fouser to a long hypothetical question propounded to him by plaintiff's counsel. After a careful consideration of the instant contention of plaintiff we are satisfied that it is a meritorious one. The question propounded to the doctor is too lengthy to be stated in full in this opinion. It is sufficient to state that the question assumed as facts the salient features of the evidence relied upon by plaintiff. The concluding part of the question is as follows: "Have you an opinion from a medical and surgical point of view, with a reasonable degree of certainty, whether the infiltration or injection of this hypodermic needle with novacaine into the gums, might or could have brought about the condition of ill being as stated in the hypothetical question to this hypothetical person?" The witness's answer is as follows: "My answer to that, if it might or could have caused it? Yes." The concluding part of the

upon the claim made by the defendant's counsel (who represents the defendant in the instant case) that the sponge that was left in the body of the plaintiff after the operation created no presumption of negligence or want of skill on the part of the defendant. The First Division of this court held that "it would seem to be self-evident that the failure to remove the sponge, standing alone and unexplained, is prima facie evidence of negligence," and reversed the judgment and remanded the cause for a new trial. However, it appears from the record in that case that Dr. Henry testified that under ordinary conditions there would be no medical reason for leaving in the abdomen a laparotomy sponge of the size of the one left in plaintiff's abdomen.

We hold that there is no merit in the instant contention of plaintiff.

Plaintiff next contends that even though we hold that the burden was upon her to prove by expert testimony that defendant was negligent or unskilled in his treatment of her, we must further hold that plaintiff has successfully borne the burden imposed upon her, and in support of this contention plaintiff relies upon the answer made by Dr. Fowser to a long hypothetical question propounded to him by plaintiff's counsel. After a careful consideration of the instant contention of plaintiff we are satisfied that it is a meritorious one. The question propounded to the doctor is too lengthy to be stated in full in this opinion. It is sufficient to state that the question assumed as facts the salient features of the evidence relied upon by plaintiff. The concluding part of the question is as follows: "Have you an opinion from a medical and surgical point of view, with a reasonable degree of certainty, whether the infiltration or injection of this hypodermic needle with novocaine into the gums, might or could have brought about the condition of ill being as stated in the hypothetical question to this hypothetical person?" The witness's answer is as follows: "My answer to that, if it might or could have caused it? Yes." The concluding part of the

question is in strict accord with the ruling of the Supreme court. It has been repeatedly held that a physician may not be asked whether the facts assumed in the hypothetical question did cause or bring about the condition or malady but that the physician can only answer that the facts might or could cause or bring about the condition or malady. (See Kimbrough v. Chicago City Ry. Co., 272 Ill. 71, 77.) Other cases to the same effect might be cited if it were necessary. The rule is based upon the theory that to permit a physician to state that the assumed facts did cause or bring about the condition or malady would be to invade the province of the jury. In view of the ruling of the Supreme court it is idle to argue that the answer of Dr. Fouser "means absolutely nothing." A hypothetical question is not improper merely because it includes only a part of the facts in evidence (see C. & E. I. R. R. Co. v. Wallace, 202 Ill. 129, 133, 134, 135), and we think that the trial court, at the instance of defendant's counsel, was not justified in compelling plaintiff's counsel to change certain facts assumed in the question and to add to the question certain evidence that defendant's counsel deemed favorable to defendant. However, we are satisfied that the question as finally put and the answer to the same made out a prima facie case for plaintiff as to the expert testimony she was required to produce. Counsel for defendant contends that because of certain answers made by Dr. Fouser upon cross-examination it should be held that his evidence was insufficient to meet the burden imposed upon plaintiff. It is sufficient to say in answer to this contention that the argument might be pertinent if the question before us turned upon the weight of the evidence, but in passing upon the ruling of the trial judge in the instant case we can look only at that evidence which is favorable to plaintiff.

Plaintiff has raised several other contentions, but in view of the ruling we have just made it is unnecessary for us to consider the same.

The judgment of the Superior court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED
FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

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permit a physician to state that the assumed facts did cause or bring about the condition or malady would be to invade the province of the jury. In view of the ruling of the Supreme Court it is idle to argue that the answer of Dr. Fonger "means absolutely nothing."

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court, at the instance of defendant's counsel, was not justified in compelling plaintiff's counsel to change certain facts assumed in

the question and to add to the question certain evidence that

defendant's counsel deemed favorable to defendant. However, we

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testimony she was required to produce. Counsel for defendant con-

tends that because of certain answers made by Dr. Fonger upon cross-

examination it should be held that his evidence was insufficient to

meet the burden imposed upon plaintiff. It is sufficient to say in

answer to this contention that the argument might be pertinent if

the question before us turned upon the weight of the evidence, but

in passing upon the ruling of the trial judge in the instant case

we can look only at that evidence which is favorable to plaintiff.

Plaintiff has raised several other contentions, but in view of the ruling we have just made it is unnecessary for us to consider the same.

The judgment of the Superior Court of Cook County is reversed and the case is remanded for a new trial.

JUDGMENT REVERSED AND CASE REMANDED

FOR A NEW TRIAL.

Sullivan, P. J., and Friend, J., concur.

42320

FRANK SLENIS,
Appellee,

v.

JOSEPH WM. ZOLPE, PETRONELE
ZOLPE, his wife, et al.,
Appellants.

319-845
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

On March 3, 1941, plaintiff sued to recover upon six promissory notes, dated March 13, 1929, and executed by defendants, Joseph Wm. Zolpe, Petronele Zolpe and Marione Griciene. The cause was tried before the court on March 13, 1942, the issues were found in favor of plaintiff, and judgment was entered against defendants for \$662.

Each of the first five notes was for \$100 and the sixth was for \$200. Note No. 1 matured September 13, 1929; No. 2, March 13, 1930; No. 3, September 13, 1930; No. 4 March 13, 1931; No. 5, September 13, 1931, and No. 6 March 13, 1932. Plaintiff claimed that he bought the notes on January 16, 1941, at a sale in a bankruptcy proceeding in the United States court, and his suit is based upon the theory that he is a holder in due course of the notes. Defendants deny liability upon the notes and contend (1) that plaintiff was not a holder in due course and that he acquired the notes many years after the maturity of the same and with notice of infirmities; (2) that the consideration for the notes at the time of their execution wholly failed; (3) that one John Jennings Zolp, illegally and without the consent or knowledge of defendants, obtained possession of the notes for his own personal purposes and that he retained possession of the same until October, 1939, when he turned the notes over to the attorney of the trustee in a bankruptcy proceeding wherein the said Zolp was the bankrupt, and that the notes were not turned over to said attorney as an asset of the said bankrupt; and (4) that the Statute

THANKS

appeals

THE

THE

JOSEPH W. ...
...
...

MR. JUSTICE ...

On March 7, 1941, ...

promissory notes, dated March 13, 1933, and ...

ants, Joseph W. ...

The cause was tried before the court on March 13, 1941, ...

issues were found in favor of plaintiff, and judgment was

entered against defendants for \$602.

Each of the five notes was for \$100 and the ...

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March 13, 1933; No. 2, September 13, 1933; No. 3, March 13, 1934;

No. 4, September 13, 1934, and No. 5, March 13, 1935.

It is claimed that he bought the notes on January 13, 1941, ...

in a bankruptcy proceeding in the United States court, and that

and is based upon the theory that he is a holder in due course

of the notes. Defendants deny liability upon the notes and con-

tend (1) that plaintiff was not a holder in due course and that

he acquired the notes many years after the maturity of the same

and with notice of defendant's (2) that the notes were stolen from

the notes at the time of their execution; (3) that

one John Jennings help, illegally and without the consent of

knowledge of defendants, obtained possession of the notes for his

own personal purposes and that he retained possession of the same

until October, 1935, when he turned the notes over to the trustee

of the trustee in a bankruptcy proceeding wherein the notes were

was the bankrupt, and that the notes were not turned over to the

attorney as an asset of the said bankrupt; and (4) that the trustee

of Limitations barred action on notes numbered 1, 2 and 3 before plaintiff commenced the instant action. Plaintiff's counsel admitted in open court that the Statute of Limitations barred action on notes 1, 2 and 3.

Defendants contend that the finding of the court is so contrary to the manifest weight of the evidence and so contrary to the law that governs the facts that the judgment entered by the trial court amounts to a miscarriage of justice. After a careful consideration of the evidence we are satisfied that this contention is a meritorious one.

The salient facts in the case are these: In 1929 defendants were the owners in fee of certain real estate in Chicago which was incumbered with a first mortgage for \$1,000, owned by one Matthews, and a junior mortgage, owned by one Kuchinskas, upon which there was an unpaid balance of \$1,200. Shortly before February 20, 1929, the Zolpes, alone, applied to the Vytauto Building and Loan Association for a loan to refinance the said mortgages. The Association, after examining the property, advised the Zolpes that it would loan them \$1,500 in furtherance of the refinancing. The Association, through its employee, one John Jennings Zolp, then contacted Matthews and Kuchinskas. Matthews insisted that his mortgage must be paid in full. Kuchinskas agreed to accept \$500 in cash and a new junior mortgage for \$700 in payment of his junior mortgage. Joseph Wm. Zolpe and Petronele Zolpe then executed two mortgages and after they were placed of record it was learned that Marione Griciene was also an owner of the premises. The said two mortgages were then canceled and released. On March 13, 1929, two new mortgages were executed by Joseph Wm. Zolpe, Petronele Zolpe and Marione Griciene, one, a first mortgage for \$1,500 payable to the Association, and a junior mortgage for \$700. Matthews was then paid \$1,000 and his mortgage was surrendered and canceled. When Kuchinskas was tender-

of limitations barred action on notes in 1929 and 1930 before plaintiff commenced the instant action. Plaintiff counsel admitted in open court that the statute of limitations barred action

on notes 1, 2 and 3.

Defendants contend that the timing of the court is not contrary to the manifest will of the parties and no contrary to the law that governs the facts that the judgment entered by the trial court amounts to a miscarriage of justice. After a careful consideration of the evidence as are admitted that this contention is a meritorious one.

The salient facts in the case are these: In 1929 defendants were the owners in fee of certain real estate in Chicago which was encumbered with a first mortgage for \$1,000, owned by one Matthews, and a junior mortgage, owned by one Kachinski. Upon which there was an unpaid balance of \$1,200. Shortly before February 20, 1929, the Zolpes, alone, applied to the Wynton Building and Loan Association for a loan to redeem the said mortgages. The Association, after examining the property, advised the Zolpes that it would loan them \$1,200 in discharge of the refinancing. The Association, through its employee, one John Jennings Zolpe, then contacted Matthews and Kachinski. Matthews insisted that his mortgage must be paid in full. Kachinski agreed to accept \$750 in cash and a new junior mortgage for \$750 in payment of his junior mortgage. Joseph and Petronelle Zolpe then executed two mortgages and after they were filed of record it was learned that Petronelle Zolpe was also in owner of the premises. The said two mortgages were then cancelled and replaced. On March 13, 1929, two new mortgages were executed by Joseph Wm. Zolpe, Petronelle Zolpe and Marion Zolpe, one, a first mortgage for \$1,200 payable to the Association, and a junior mortgage for \$750. Matthews was then paid \$1,000 and his mortgage was surrendered and canceled. When Kachinski was delin-

ed \$500 in cash and the new junior mortgage for \$700 and the notes upon which the instant suit is predicated in payment and cancellation of his junior mortgage of \$1,200, he repudiated the agreement he had made and insisted on a cash payment in full of his junior mortgage. Thereupon the Association paid Kuchinskas \$500 in cash, and arrangements were made to pay him the balance of \$700 in cash, and this last amount was paid Kuchinskas. After Kuchinskas refused to accept the \$700 junior mortgage and the notes, instead of returning the same to defendants or cancelling or releasing the same, John Jennings Zolp, who was the conveyancer of the Association, took possession of the mortgage and six notes in question for his own personal purposes and retained possession of the same until October, 1939. He testified that he knew that the said mortgage "was no good;" that Joseph Wm. Zolpe owed him \$314 on a matter that had no connection with the notes in question, but that he did not retain possession of the \$700 notes as security for the \$314 debt. He further testified that he first kept possession of the mortgage and notes in his office and later in the basement of his home; that in October, 1939, he filed a petition in bankruptcy but that he did not schedule the \$700 junior mortgage notes as an asset or part of his estate, as he had no claim upon them; that he turned over to the attorney for the trustee in bankruptcy, Langdon, the \$314 note that he had against Joseph Wm. Zolpe "and this [the notes in question] I put with that \$300.00 open account as a sort of a whip. I hold this [the notes in question] as no value, but I says he owes me --;" that he left the notes in question at the office of the attorney for the trustee. Plaintiff, an insurance broker, testified that he bought the notes in question at a bankruptcy auction held in the bankruptcy proceedings of John Jennings Zolp in the latter part of December, 1940, or the first part of January, 1941. During his examination the following occurred: "Q. Now, you want the

his examination the following occurred: "Q. Now, you want the part of December, 1940, or the first part of January, 1941. During the bankruptcy proceedings of John Jennings, Jr. in the latter he bought the notes in question at a bankruptcy auction held in for the trustee. Plaintiff, an insurance broker, testified that that he left the notes in question at the office of the attorney [the notes in question] as no value, but I say he owes me --;" but with that \$300.00 open account as a sort of a whip. I hold this he had against Joseph Wm. Loepe "and this [the notes in question] I attorney for the trustee in bankruptcy, Langdon, the \$314 note that estate, as he had no claim upon them; that he turned over to the wife the \$700 Junior mortgage notes as an asset or part of his 1939, he filed a petition in bankruptcy but that he did not subse- in his office and later in the basement of his home; that in October testified that he first kept possession of the mortgage and notes sion of the \$700 notes as security for the \$314 debt. He further tion with the notes in question, but that he did not retain posses- that Joseph Wm. Loepe owed him \$314 on a matter that had no connec- He testified that he knew that the said mortgage "was no good," poses and retained possession of the same until October, 1939. the mortgage and six notes in question for his own personal pur- who was the conveyance of the Association, took possession of ants or cancelling or releasing the same, John Jennings, Jr., mortgage and the notes, instead of returning the same to Plaintiff. After Kuchinaka refused to accept the \$700 Junior the balance of \$700 in cash, and this last amount was paid Kuchinaka \$500 in cash, and arrangements were made to pay him full of his Junior mortgage. Thereupon the Association paid the agreement he had made and insisted on a cash payment in cancellation of his Junior mortgage of \$1,200, he relinquished notes upon which the instant suit is predicated in payment and of \$200 in cash and the new Junior mortgage for \$200 and the

Court here to understand that these notes were sold by the trustee in bankruptcy to you? A. That's right." Plaintiff further testified that prior to the time he bought the notes he did not examine the schedule filed by the trustee in the bankruptcy proceedings; "Q. How did you learn that the trustee in bankruptcy held these notes? A. I don't know; I just -- when it was offered on the sale, I bought it." Plaintiff's counsel offered the following receipt in evidence, at the same time stating: "Mr. Barbera: I will offer that in evidence, too. It's a receipt, paying the balance due on the payment of the note:"

"No. _____

Jan 16, 1941

"RECEIVED from Frank Slenis

~~"In good order the following articles:~~

"The sum of 92.50 as balance on the Sale of Trustee's right Title & interest in & to realestate of John J. Zolp, bankrupt #71511, U. S. Dist. Court

"Addressed to _____

"Harry Dubia

"Retain this slip to compare
with Invoice.

"Per E Small"

Plaintiff testified that the notes were delivered to him at the same time that he was given the above receipt. Plaintiff did not produce any receipt of the trustee showing payment for the notes nor did he state that he had any such receipt. He offered no evidence save his own. In spite of the nature of the defense interposed plaintiff did not see fit to call Dubia, the trustee, nor E. Small, who signed the receipt, nor Langdon, the trustee's attorney, nor anyone connected with the trustee, in support of his claim. However, certain records in the bankruptcy proceedings were introduced by defendants. In the accounts of the trustee the notes in question are not listed as assets of the estate. No mention is made of any sale of the notes, nor does the trustee charge himself with the receipt of any money

Count more to understand that these notes are not in the hands of the plaintiff. In the first place, the notes are not in the hands of the plaintiff. The second thing is that the notes are not in the hands of the plaintiff. The third thing is that the notes are not in the hands of the plaintiff. The fourth thing is that the notes are not in the hands of the plaintiff. The fifth thing is that the notes are not in the hands of the plaintiff. The sixth thing is that the notes are not in the hands of the plaintiff. The seventh thing is that the notes are not in the hands of the plaintiff. The eighth thing is that the notes are not in the hands of the plaintiff. The ninth thing is that the notes are not in the hands of the plaintiff. The tenth thing is that the notes are not in the hands of the plaintiff.

"No."
"RECEIVED FROM" (with initials)

"In case of order of the trustee on the date of the trustee's right title & interest in & to release of about 7, 1941, County of Will, U. S. Dist. Court

"Addressed to"

"Only with"

"Setain this slip to compare with Invoice"

Plaintiff testified that the notes were delivered to him at the same time that he was given the above receipt. Plaintiff did not produce any receipt of the trustee showing payment for the notes nor did he state that he had any such receipt. He offered no evidence save his own. In spite of the nature of the defense interposed plaintiff did not see fit to call upon the trustee, nor E. Small, who signed the receipt, nor Langdon, the trustee's attorney, nor anyone connected with the trustee, in support of his claim. However, certain records in the county proceedings were introduced by defendants. In the records of the trustee the notes in question are not listed as assets of the estate. No mention is made of any sale of the notes, nor does the trustee charge himself with the receipt of any money

on account of said notes. Indeed, the notes are not mentioned in any way in any of said accounts. In the trustee's account the following item appears: "1941 Jan - Cash received on sale of real estate held at final meeting of creditors \$125.00." It further appears that on January 14, 1941, the court reporter for the United States referees in bankruptcy was paid by the trustee, Dubia, for his attendance at the "final meeting and sale of real estate." The receipt offered by plaintiff in support of his claim that he paid the trustee for the notes conclusively shows that all that plaintiff bought at the sale was the "Trustee's right Title & interest in & to real estate of John J. Zolp, bankrupt." It is obvious why plaintiff did not call the trustee in bankruptcy as a witness, as the latter, in the face of the records in the bankruptcy proceedings, would not dare testify that he sold the notes to plaintiff as part of the assets in the bankruptcy proceedings. It is equally clear why the bankrupt did not schedule the notes as an asset of the estate. There is no evidence in the record to show that Attorney Langdon ever turned over the notes to the trustee. The only reasonable conclusion that can be drawn from all the facts in evidence is that plaintiff secured possession of the notes in some other manner than as a purchaser of an asset of the estate at the bankruptcy sale. His failure to call the trustee or some person connected with the trustee to substantiate his claim that he purchased the notes at the bankruptcy sale is most significant. It is also strange that the notes of defendants, according to plaintiff's testimony, went begging at the bankruptcy sale. The evidence shows that defendants are solvent; that the mortgage that they gave to the Vytauto Building and Loan Association is still in force and the payments due upon the same are being met by them. They have filed an appeal bond of \$1,000 in the instant proceedings.

As we read this record it is idle for plaintiff to argue

in account of said notes. Indeed, the notes are not mentioned in any way in any of said accounts. In the trustee's account the following item appears: "1941 Jan - Cash received on sale of real estate sold at final meeting of creditors \$152,000." It further appears that on January 14, 1941, the court reporter for the United States referees in bankruptcy was paid by the trustee, Duhis, for his attendance at the "final meeting and sale of real estate." The record offered by plaintiff in support of his claim that he paid the trustee for the notes conclusively shows that the trustee bought at the sale the "trustee's right title & interest in & to real estate of John J. Duhis, bankruptcy." It is obvious why plaintiff did not call the trustee in bankruptcy as a witness, as the latter, in the face of the records in the bankruptcy proceedings, would not dare testify that he sold the notes to plaintiff as part of the assets in the bankruptcy proceedings. It is equally clear why the trustee did not schedule the notes as an asset of the estate. There is no evidence in the record to show that Attorney Lanyon ever turned over the notes to the trustee. The only reasonable conclusion that can be drawn from all the facts in evidence is that plaintiff assumed possession of the notes in some other manner than as a purchaser of an asset of the estate at the bankruptcy sale. His failure to call the trustee or some person connected with the trustee to substantiate his claim that he purchased the notes at the bankruptcy sale is most significant. It is also strange that the notes of defendant, according to plaintiff's testimony, went begging at the bankruptcy sale. The evidence shows that defendants are solvent; that the mortgage that they gave to the Veterans' Building and Loan Association is still in force and the payments due upon the same are being met by them. They have filed an appeal bond of \$1,000 in the instant proceedings.

As we read this record it is idle for plaintiff to argue

that the judgment entered in this case should be affirmed. There can be no question but that the bankrupt never acquired any semblance of title to the \$700 notes and it is equally clear that the trustee, if he ever had possession of the notes, in the matter of title stood in the shoes of the bankrupt, and as the titles of the bankrupt and the trustee were defective the burden was upon plaintiff to prove that he acquired the title as a holder in due course. (See the Negotiable Instruments Act, Ill. Rev. Stat. 1941, ch. 98, par. 79.) The Negotiable Instruments Act also provides (par. 72):

"A holder in due course is a holder who has taken the instrument under the following conditions:

"1. That the instrument is complete and regular upon its face.

"2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.

"3. That he took it in good faith and for value.

"4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

According to plaintiff's testimony, he acquired the notes many years after the maturity of the same. Before he purchased them it would seem he would have examined the schedules in the bankruptcy proceedings to ascertain what title, if any, the trustee could transfer, yet he made no such examination. The records in the proceedings would have shown him that the trustee neither had any title in the notes nor claimed to have any; indeed, that the notes were not scheduled as assets of the estate. That plaintiff was not an entire stranger to the bankruptcy proceedings is evident from the fact that the trustee, in his statement of account, takes credit for the following item:

that the judgment entered in this case should be affirmed. There can be no question but that the defendant must establish the absence of title to the 1941 notes and its right to claim that the trustee, if he ever had possession of the notes, in the matter of title stood in the shoes of the bankrupt, and as the titles of the bankrupt and the trustee were identical the burden was upon plaintiff to prove that he acquired the title as a holder in due course. (See the Negotiable Instruments Act, 1941, ch. 98, par. 92.) The Negotiable Instruments Act also provides (par. 92):

- "A holder in due course is a holder who has taken the instrument under the following conditions:
- "1. That the instrument is complete and regular upon its face.
 - "2. That he became the holder of it before it was overdue, and without notice that it has been previously dishonored, if such was the fact.
 - "3. That he took it in good faith and for value.
 - "4. That at the time it was negotiated to him he had no notice of any infirmity in the instrument or of defect in the title of the person negotiating it."

According to plaintiff's contention, he acquired the notes many years after the maturity of the same, before he purchased them it would seem he would have examined the certificates in the bankruptcy proceedings to ascertain their title, and if the trustee could transfer, yet he made no such examination. The records in the proceedings would have shown to him that the trustee neither had any title in the notes nor claim to have any; indeed, that the notes were not scheduled as assets of the estate. That plaintiff was not an entire stranger to the bankruptcy proceedings is evident from the fact that the trustee, in his statement of account, takes credit for the following item:

"Frank Slenis, Pwr. of Atty. for John Stancel \$2,38." Counsel for plaintiff claims that the evidence shows that plaintiff, in good faith, purchased for a valuable consideration, from the trustee in bankruptcy, at a legal sale in the John J. Zolp bankruptcy proceeding, the notes in question and the trust deed securing the same, and that the notes and trust deed were assets of the estate of the said bankrupt. We are satisfied that this theory of fact cannot be sustained.

Justice demands that the judgment of the Municipal court of Chicago be reversed and it is accordingly so ordered.

JUDGMENT REVERSED.

Sullivan, P. J., and Friend, J., concur.

"Frank Blaine, Esq. of Atty. for John O'Connell, Connell
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 good faith, purchased for valuable consideration, from the
 trustee in bankruptcy, at a legal sale in the John J. O'Connell Bank-
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 the same, and that the notes and trust deed were assets of the
 estate of the said bankrupt. We are satisfied that this theory
 of fact cannot be sustained.
 Justice demands that the judgment of the United States Court
 of Chicago be reversed and it is accordingly so ordered.
 JACOBUS T. HARRIS.

Gallivan, T. J., and Friend, J. J., counsel.

42574

VIRGINIA K. HOWIE,
Appellee,

v.

JAMES H. DOBBINS and
PAULINE M. DOBBINS,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

August 8, 1941, plaintiff filed her complaint in chancery to foreclose the lien of a trust deed, which was a second lien given to secure an indebtedness of \$1,231 evidenced by defendants' note which had been reduced to judgment in the Municipal court of Chicago. Defendants in their answer admitted the execution of the note and trust deed but averred that in the subsequent transfer of the property to them by plaintiff and the execution of another mortgage at that time they had been overcharged by plaintiff in that they were required to pay \$101.50 to the Chicago Title & Trust Co. for the title guaranty policy and further that they had been overcharged as to other items and moreover that they had tendered payment of all amounts due before the suit was brought. After the issue was joined the cause was referred to a master in chancery who took the evidence, made his report, found in favor of plaintiff and recommended a decree accordingly. Objections were filed to the report by defendants.

Plaintiff also filed some objections which have been abandoned. The court approved the master's report, entered a decree of foreclosure, and defendants appeal.

The record discloses that May 7, 1937, plaintiff entered into a contract with defendants to sell them the lot involved in the foreclosure suit for \$5,750. Three hundred dollars was to be paid in cash and \$1,650 in monthly installments of \$45 each, commencing June 7, 1937, and defendants were to assume a mortgage of \$3,800 which

VIRGINIA K. HOWIE,
Appellee,
v.
JAMES H. DOBBS and
PAULINE M. DOBBS,
Appellants.

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The record discloses that May 7, 1937, plaintiff entered into a contract with defendants to sell them the lot involved in the foreclosure suit for \$2,750. Three hundred dollars was to be paid in cash and \$1,650 in monthly installments of \$45 each, commencing June 7, 1937, and defendants were to assume a mortgage of \$2,600 which

was then on the property. The contract provided that the "Vendor agrees to furnish at the time of the conveyance of the real estate as herein provided **** a complete merchantable abstract of title, or merchantable title guaranty policy issued by Chicago Title and Trust Company."

The payments of \$45 monthly were made by defendants and when the \$3,800 mortgage became due, December 1, 1938, defendants were unable to pay it and it was agreed that plaintiff convey the property to defendants who would give a trust deed on the property for \$4,500, to secure the Percy Wilson Co. which was making the loan, the proceeds to be used to pay off the \$3,800 mortgage and expenses, and that defendants would at the same time execute their note and trust deed for the balance remaining due of the purchase price, namely, \$1,231, payable \$10 monthly commencing January 7, 1939, which would be a second lien on the premises. To bring this about an escrow agreement was entered into whereby plaintiff and her husband deposited with the Title & Trust Co., (1) Warranty Deed conveying the premises in question to defendants as joint tenants, (2) Owner's guaranty policy, (3) fire insurance policy, (4) The contract for warranty deed entered into between the parties, above referred to. The escrow agreement also showed that the Percy Wilson Mortgage and Finance Company, at the time, deposited a check with the Title & Trust Co. for \$4,444.17, being the proceeds of the \$4,500 mortgage, and it further provided that the mortgage was to be filed for record at once and when the Title & Trust Co. was prepared to issue an owner's guaranty policy for \$9,000 in the usual form, guaranteeing the title of defendants as joint tenants to the premises, then the Title & Trust Co. was to pay the \$3,800 mortgage, obtain a cancellation of the trust deed securing that indebtedness, make certain reductions and "Pay to yourselves charges hereinafter charged to Percy Wilson Mortgage & Finance Corp." It was then to pay the balance to plaintiff, Mrs. Howie. Afterward the deal was consummated as provided in the escrow agreement, the \$3,800 encumbrance was paid off and the expenses were charged to defendants.

Under the trust deed in foreclosure, dated December 7, 1938,

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Under the trust deed in foreclosure, dated December 7, 1938,

3.

defendants were to make the monthly payments of \$10. Afterward there were some negotiations between counsel representing the parties and objections were made to charging defendants with the amount paid to the Title & Trust Co. for the owner's guaranty policy for \$9,000. Default having been made in the monthly payments of \$10, after more than 9 months, plaintiff caused judgment by confession to be entered September 13, 1939 on the note against defendants in the Municipal court of Chicago. An execution was issued returned no property found, citation proceeding was brought and defendant, James H. Dobbins was examined but no assets were discovered. No part of the judgment was paid and after the monthly payments of \$10 were in arrears for 27 months, plaintiff filed the bill August 8, 1941, to foreclose the lien of the trust deed.

Counsel for defendants contend that the cost of the guaranty policy, \$101.50, should be borne by plaintiff under the terms of the original contract for warranty deed dated May 7, 1937, because under the contract plaintiff was required to give a guaranty policy. Counsel also say that defendants "are ready, able and willing to pay all installments due on said second mortgage upon a settlement of accounts with plaintiff," and that plaintiff ought not to be permitted "to take advantage of the strict terms of the forfeiture clauses in said note and trust deed to work a forfeiture on defendants and deprive them of their homestead and equitable interest in the premises." And continuing counsel say: "Defendants make tender into Court in their Answer, of \$270 being \$10 for 27 months from June 30, 1939 to September 1, 1941, less \$74.97 claimed as credit, or whatever sum may be found to be due after a just and true accounting."

It is unfortunate that defendants did not pay the amounts due but on the contrary caused a great deal of costs to be incurred. The note provided that in case of default in payment of the monthly installments the payment of the balance might be accelerated and we

defendants were to make the monthly payments of \$10. Afterward there were some negotiations between counsel representing the parties and objections were made to charging defendants with the amount paid to the Title & Trust Co. for the owner's guaranty policy for \$2,000. Default having been made in the monthly payments of \$10, after more than 9 months, plaintiff caused judgment by confession to be entered September 12, 1933 on the note against defendants in the Municipal court of Chicago. An execution was issued returned no property found, citation proceeding was brought and defendant, James H. Dobbins was examined but no assets were discovered. No part of the judgment was paid and after the monthly payments of \$10 were in arrears for 27 months, plaintiff filed the bill August 2, 1941, to foreclose the lien of the trust deed. Counsel for defendants contend that the cost of the guaranty policy, \$101.50, should be borne by plaintiff under the terms of the original contract for warranty deed dated May 7, 1937, because under the contract plaintiff was required to give a guaranty policy. Counsel also say that defendants "are ready, able and willing to pay all installments due on said second mortgage upon a settlement of accounts with plaintiff," and that plaintiff ought not to be permitted "to take advantage of the strict terms of the foreclosure clauses in said note and trust deed to work a foreclosure on defendants and deprive them of their homestead and equitable interest in the premises." And continuing counsel say: "Defendants make tender into Court in their Answer, of \$270 being \$10 for 27 months from June 30, 1933 to September 1, 1941, less \$74.97 claimed as credit or whatever sum may be found to be due after a just and true accounting."

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4.

think defendant who failed to pay the \$10 monthly for 27 months, as the undisputed evidence shows was the case ought not now complain. The escrow agreement shows that plaintiff deposited an owner's guaranty policy with the Chicago Title & Trust Co., and we are of opinion, upon a consideration of all the evidence, that the policy issued under the escrow agreement which guaranteed the title of defendants to the property to the extent of \$9,000 was not the same character of policy mentioned in the original contract for warranty deed. Moreover, that contract was cancelled when the refinancing of the \$3,800 mortgage was carried out.

Upon a consideration of all the evidence in the record and without discussing it further, we are clearly of opinion that the decree of the Superior court appealed from is correct and must be affirmed.

DEGREE AFFIRMED.

Niemeyer, J., and
Matchett, J., concur .

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The second agreement shows that Plaintiff deposited an owner's
warranty policy with the Chicago Title & Trust Co., and we are of
opinion, upon a consideration of all the evidence, that the policy
issued under the second agreement which guaranteed the title of
defendants to the property to the extent of \$9,000 was not the same
character of policy mentioned in the original contract for warranty
deed. Moreover, that contract was cancelled when the refunding of
the \$3,800 mortgage was carried out.

Upon a consideration of all the evidence in the record and
without dissenting it further, we are clearly of opinion that the
decision of the Superior court appealed from is correct and must be

affirmed.

DECISION AFFIRMED.

Niemeyer, J., and
Ketchum, J., concur.

42587

319 I.A. 648

DAVID STEIN,

Appellee,

v.

WALTER J. CUMMINGS and DANIEL
C. GREEN, as Receivers, etc., et
al., doing business as Chicago
Surface Lines,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

156
443

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of defendants in starting a street car while he was in the act of alighting. There was a verdict in his favor for \$2,000 and defendants appeal.

The record discloses that between 5 and 6 o'clock on the evening of December 14, 1940, plaintiff who was a passenger on one of defendants' westbound street cars on Chicago avenue, was standing on the rear platform and when the car was about 100 feet east of Kedzie avenue, a north and south street, as he was alighting from the car, he was thrown and injured. His position is that the car had stopped and while he was in the act of alighting, it was negligently started forward causing him to be thrown to the ground. On the other side, defendants' position is that the car had not stopped when plaintiff attempted to alight from it.

Defendants contend that the verdict is against the manifest weight of the evidence and that the court erred in giving two instructions at plaintiff's request.

The evidence is to the effect that plaintiff was about 60 years of age and was engaged in peddling notions. At the time in question, he had a tray strapped around his neck in which he carried

3191A.645

DAVID STEIN,

Appellee,

v.

WALTER T. GUNNING and DANIEL
G. GREEN, as Receivers, etc., et
al., doing business as Chicago
Surface Lines,

Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendants to recover damages for personal injuries claimed to have been sustained by him on account of the negligence of defendants in starting a street car while he was in the act of alighting. There was a verdict in his favor for \$2,000 and defendants appeal.

The record discloses that between 8 and 8 o'clock on the evening of December 14, 1940, plaintiff who was a passenger on one of defendants' westbound street cars on Chicago Avenue, was standing on the rear platform and when the car was about 100 feet east of Kedzie Avenue, a north and south street, as he was alighting from the car, he was thrown and injured. His position is that the car had stopped and while he was in the act of alighting, it was negligently started forward causing him to be thrown to the ground. On the other side, defendants' position is that the car had not stopped when plaintiff attempted to alight from it. Defendants contend that the verdict is against the manifest weight of the evidence and that the court erred in giving two instructions at plaintiff's request.

The evidence is to the effect that plaintiff was about 50 years of age and was engaged in peddling notions. At the time in question, he had a tray strapped around his neck in which he carried

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his notions. The tray was about 16 or 18 inches wide and extended about 12 inches in front of him. It was dark or just getting dark at the time.

Plaintiff at the time lived at 3140 West Jackson Boulevard. He was on his way home and intended to change street cars at Kedzie, which is 3200 west. Just before the car on which he was riding reached California avenue, a north and south street, a Kedzie avenue, street car turned in ahead of the car on which he was a passenger and the two cars proceeded west. When the Kedzie avenue street car reached the regular stopping place on the west side of Kedzie avenue, it came to a stop, the Chicago avenue street car pulled up behind it and plaintiff testified it came to a stop a few feet behind the Kedzie avenue car and as he was in the act of alighting from the car it started up and he was thrown and injured.

There was but one passenger, Morris Gilman, on the rear platform at the time. He was standing near plaintiff. He, the conductor, the motorman and a policeman (who was riding on the front platform) testified that the Chicago avenue street car made but one stop. The conductor and Gilman testified that the car slowed down and plaintiff attempted to alight from it before it had stopped. The motorman testified that the car made but one stop, as it came to Kedzie avenue and that when he did not get a signal bell from the conductor, to go ahead, he looked out the side door and saw the conductor talking to plaintiff who was on the street. The policeman, in substance, testified the same, as did the motorman, so that the question of liability was whether the car had stopped and as plaintiff was alighting started up, or whether he attempted to alight from the street car before it had come to a stop.

The evidence on this point is sharply conflicting, and while plaintiff was the only witness to testify on this point - that the car had stopped and then started up before he had time to alight - there were four witnesses who gave testimony to the contrary. Upon a careful consideration of all the evidence we are of opinion that since

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3.

the jury and the trial judge, who saw and heard the witnesses testify, found in favor of plaintiff we would not be warranted under the law, in holding that the verdict, approved as it was by the trial judge, is against the manifest weight of the evidence. We have only the printed page before us.

Defendants contend that the court erred in giving instruction No. 3, requested by plaintiff. That instruction is as follows: "3. The Court instructs the jury that in passing upon the testimony of all the witnesses who have testified in this case, you have the right to take into consideration any interest which said witnesses may feel growing out of their relation to either of the parties to this suit, as employees or otherwise, if any such is shown, and give to the testimony such weight only as you think it entitled to under the evidence in this case." The complaint to this instruction, as stated by counsel is: that it "was aimed at the conductor and motorman," and in support of this cite Roberts v. Chicago City Railway Co., 262 Ill. 228, where they say the Supreme court held that while it was proper to instruct the jury that they might consider any interest a witness might have in the result of the suit, yet it was improper to further instruct the jury that they might also "consider the relation existing between any witness and either party, in determining the weight which ought to be given to the testimony of such witness."

The Roberts case was before the Appellate Court and the Supreme court three times, 177 Ill. App. 400, which affirmed the judgment against the street car company. This was reversed on appeal and the cause remanded, 262 Ill. 228, and after a third trial, and judgment for plaintiff, the judgment was reversed with a finding of facts, 198 Ill. App. 31. The Roberts case was not reversed by the Supreme court on the sole ground that an instruction somewhat similar to instruction No. 3 in the case before us, but a number of errors were there pointed out. Upon a consideration of all the instructions we think instruction No. 3 was not reversibly erroneous. Fannon v. Morton, 228 Ill. App. 415.

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By instruction No. 4, given at plaintiff's request, of which defendants complain, the jury were told that "4. The jury are instructed that they are the judges of the credit that ought to be given to the testimony of the different witnesses, and they are not bound to believe anything to be a fact, because a number of witnesses have stated it to be so, provided the jury believe from all the evidence, that as to such matters such witness or witnesses are mistaken, or has or have knowingly testified falsely."

Counsel for defendants say that the giving of this instruction was prejudicial "since there was but one occurrence witness on the plaintiff's side and a number of occurrence witnesses on the defendants' side, the jury would consider this instruction as applying to the defendants' witnesses only." In support of their position counsel cite Walsh v. Chicago Railways Co., 294 Ill. 586.

That was a case brought to recover damages for personal injuries against the street car company. Plaintiff charged that she was a passenger on a northbound Halsted street car and intended to alight at 12th street; that she sat down in a seat three or four seats from the rear; that later the car became crowded with men who got on at the Stockyards and when she wanted to get off at 12th street, the car was so over-crowded that some of the passengers on the rear platform pushed her off and she was injured. On the other side, the evidence was to the effect that the car stopped at 12th street to receive and discharge passengers and that the car had started up when plaintiff got near the door and the car was again stopped north at 12th street, at which time and place plaintiff was injured. The judgment in plaintiff's favor was affirmed by another division of this court, one of the justices dissenting (216 Ill.App. 409). On appeal the judgment of this court was reversed and the cause remanded. A great deal is said in the opinion of the court as to the law applicable to the over-crowding of cars. A number of authorities from several jurisdictions are cited and

By instruction No. 4, given at plaintiff's request, of which defendants complain, the jury were told that "4. The jury are instructed that they are the judges of the credit that ought to be given to the testimony of the different witnesses, and they are not bound to believe anything to be a fact, because a number of witnesses have stated it to be so, provided the jury believe from all the evidence, that as to such matters such witness or witnesses are mistaken, or has or have knowingly testified falsely."

Counsel for defendants say that the giving of this instruction was prejudicial "since there was but one occurrence witness on the plaintiff's side and a number of occurrence witnesses on the defendants' side, the jury would consider this instruction as applying to the defendants' witnesses only." In support of their position counsel cite Walsh v. Chicago Railway Co., 234 Ill. 586.

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discussed as to whether the over-crowding was the proximate cause of the accident and that term is discussed at considerable length. The court then quotes an instruction complained of which read: "The court instructs the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully as to any material fact or circumstance and are not corroborated by other credible witnesses or by circumstances proved in the case." The court then discusses the evidence and said: "It is for the jury to determine to what extent each witness is credible, and it is error for the court to instruct them as to what witnesses are credible. The instruction might also tend to cast a suspicion upon the credibility of the plaintiff in error's witnesses with reference to their testimony as to how the accident happened." The court held the giving of the instruction was reversibly erroneous. By that instruction the jury were told that the testimony of one credible witness might be entitled to more weight than the testimony of many others. There is no such statement in the instruction complained of in the instant case.

In the case at bar the court gave 8 instructions at plaintiff's request and 22 requested by defendants. Neither instruction No. 3 or No. 4 directed a verdict. At defendants' request the court instructed the jury that "The number of credible witnesses testifying to any material point in dispute is an element that the jury have a right to take into consideration in determining wherein lies the preponderance or greater weight of the evidence." They were further instructed that it was the juror's duty to consider the case the same as if it were between two private citizens and that while the law permitted the plaintiff to testify in her own behalf, the jury had the right, in weighing her testimony, to determine how much credence is to be given to her testimony and to take into consideration that plaintiff

discussed as to whether the over-crediting was the proximate cause of the accident and that term is discussed at considerable length. The court then quotes an instruction complained of which read: "The court instructs the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe, from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully as to any material fact or circumstance and are not corroborated by other credible witnesses or by circumstances proved in the case." The court then discusses the evidence and said: "It is for the jury to determine to what extent each witness is credible, and it is error for the court to instruct them as to what witnesses are credible. The instruction might also tend to cast a suspicion upon the credibility of the plaintiff in error's witnesses with reference to their testimony as to how the accident happened." The court held the giving of the instruction was reversibly erroneous. By that instruction the jury were told that the testimony of one credible witness might be entitled to more weight than the testimony of many others. There is no such statement in the instruction complained of in the instant case.

In the case at bar the court gave 8 instructions at plaintiff's request and 22 requested by defendant. Neither instruction No. 8 or No. 4 directed a verdict. At defendant's request the court instructed the jury that "The number of credible witnesses testifying to any material point in dispute is an element that the jury have a right to take into consideration in determining wherein lies the preponderance or greater weight of the evidence." They were further instructed that it was the jury's duty to consider the case the same as if it were between two private citizens and that while the law permitted the plaintiff to testify in her own behalf, the jury had the right, in weighing her testimony, to determine how much credence is to be given to her testimony and to take into consideration that plaintiff

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was interested in the result of the suit.

Upon a consideration of the record we are of opinion that the errors complained of are not reversibly erroneous and the judgment of the Superior court of Cook county is affirmed.

JUDGMENT AFFIRMED.

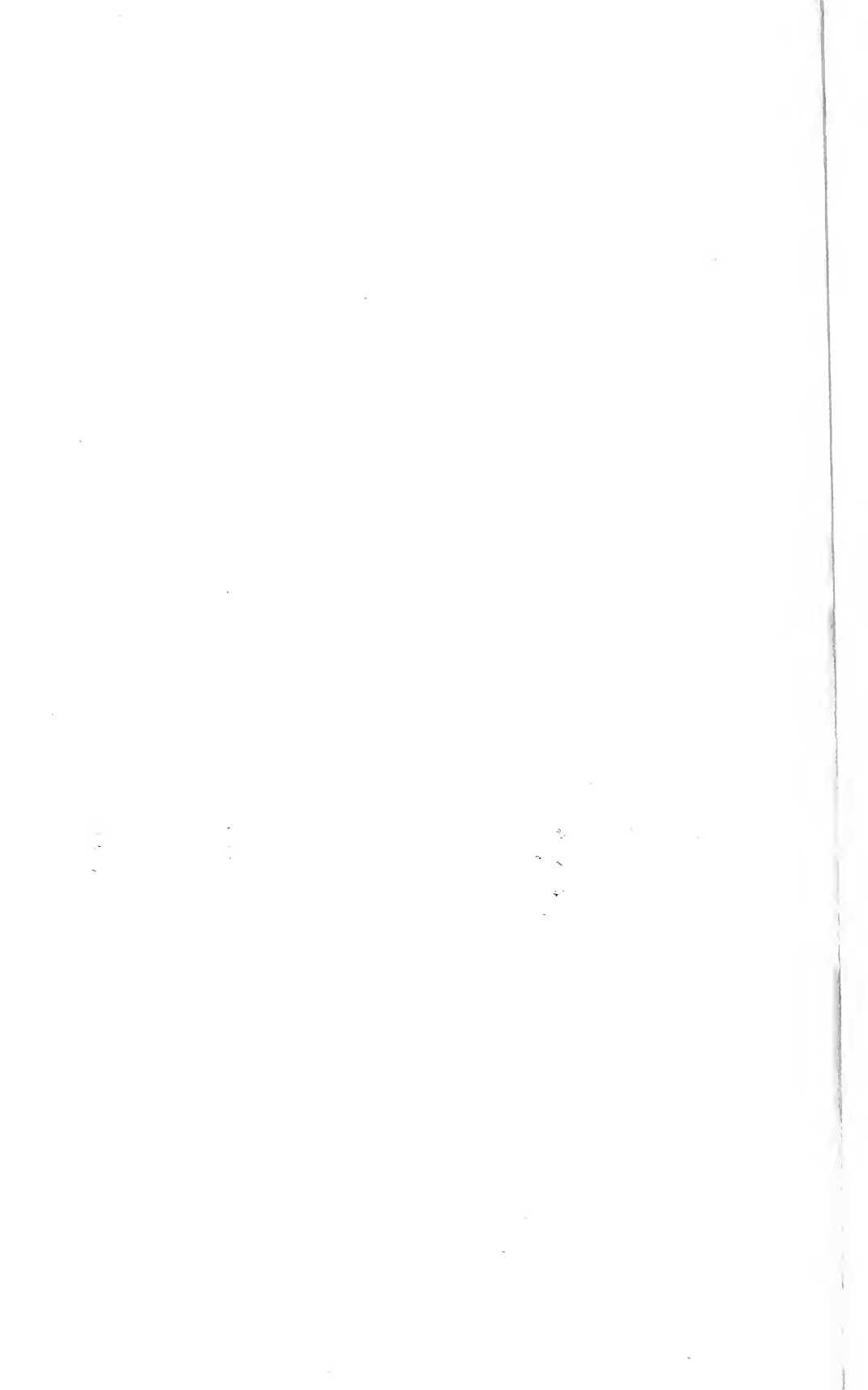
Matchett, J., and Niemeyer, J., concur.

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Upon a consideration of the record we are of opinion that the errors complained of are not reversible errors and the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

WATCHELL, J., and NIEMEYER, J., concur.



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